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THE LORD ADVOCATES OF SCOTLAND

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FOR

DAVID DOUGLAS.

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THE
LORD ADVOCATES
OF SCOTLAND

FROM THE CLOSE OF THE FIFTEENTH CENTURY
TO THE PASSING OF THE REFORM BILL

BY
GEORGE W. T. OMOND

ADVOCATE

VOL. I.

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P R E F A C E.

It has been my aim, in this work, to give merely an historical sketch of the Lord Advocates, rather than a series of complete "Lives," to trace the history of an office, the holders of which have enjoyed peculiar opportunities of influencing the course of politics, and the development of the law, in Scotland, during a period of above four hundred years, and to describe the various arrangements which, since the Union, have been made for the management of Scottish affairs.

In addition to the ordinary sources of information, I have been permitted to examine several valuable collections of Manuscripts,—the documents preserved in the Public Record Office in London, and in the General Register House in Edinburgh; the records of the High Court of Justiciary, and of the Court of Session; the mss. in the Advocates' Library; the Minutes of the Faculty of Advocates; various collections in the British Museum; the Stair mss.; the Glendoick mss.; and others.

Of these the most important are the documents in the Public Record Office (cited in the footnotes as “Scot. MSS. Record Office”), which contain not only State papers, but the private correspondence of official persons during the period from the Union in 1707 to the passing of the Reform Bill of 1832.

I have to offer my best thanks to Mr. Dickson, Curator of the Historical Department of the Register House, Mr. Alfred Kingston, of the Public Record Office, and Mr. Clark, Keeper of the Advocates’ Library, for the kind assistance which I have invariably received at their hands.

G. W. T. O.

EDINBURGH, 1st *September* 1883.

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CHRONOLOGICAL TABLE.

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1483. JOHN ROSS of Montgrenan.
1494. JAMES HENDERSON of Fordel.
1503. RICHARD LAWSON of Hariggs, along with Henderson.
1507. JAMES WISHART of Pittarrow, along with Henderson, on the death of Lawson.
1524. ADAM OTTERBURN of Auldhame and Redhall, on the death of Wishart.
1527. JAMES FOULIS of Colinton, along with Otterburn.
1532. The Court of Session instituted, and the King's Advocate made one of the judges.
1538. HENRY LAUDER of St. Germain's, on the dismissal of Otterburn.
1540. The King's Advocate first named on the rolls of Parliament as an Officer of State.
1555. JOHN SPENS of Condie, along with Lauder.
1559. ROBERT CRICHTON of Eliok, along with Spens, on the retirement of Lauder.
1573. DAVID BORTHWICK, along with Crichton on the death of Spens.
1580. ROBERT CRICHTON, sole Advocate on the death of Borthwick.
1582. DAVID MACGILL of Cranstonriddel, on the death of Crichton.
1587. The King's Advocate becomes Public Prosecutor.
1589. SIR JOHN SKENE of Curriehill, along with Macgill.
1594. WILLIAM HART, along with Macgill, on the retirement of Skene, who became Lord Clerk Register.
1596. SIR THOMAS HAMILTON (afterwards first Earl of Haddington), along with Macgill and Hart.
1597. SIR THOMAS HAMILTON, Sole Advocate. (Macgill died in 1596, and Hart became a Justice-Depute in 1597.)
1612. SIR WILLIAM OLIPHANT, on the retirement of Hamilton, who became Lord Clerk Register.
- Hamilton is appointed "Sole Advocate" in 1597, on the ground that "the said office may be better handled, and with less cost to the subject, when one qualified, discreet, and diligent man gives himself wholly thereto, and bears the full charge in his own person, than when the charge referred to is committed to two or more."

1626. SIR THOMAS HOPE, along with Oliphant.
 1628. SIR THOMAS HOPE, Sole Advocate on the death of Oliphant.
 1646. SIR ARCHIBALD JOHNSTON of Warriston, on the death of Hope.
 1649. SIR THOMAS NICOLSON, on the retirement of Johnston, who became Lord Clerk Register.

THE COMMONWEALTH.

1658. SIR GEORGE LOCKHART of Carnwath, Advocate to the Lord Protector.

For some time the duties of the Lord Advocate are performed by Henry Whalley, Judge Advocate to Cromwell's army.

THE RESTORATION.

1661. SIR JOHN FLETCHER.
 1664. SIR JOHN NISBET of Dirleton, on the dismissal of Fletcher.
 1677. SIR GEORGE MACKENZIE of Rosehaugh, on the dismissal of Nisbet.
 1687. SIR JOHN DALRYMPLE (afterwards first Earl of Stair), on the dismissal of Mackenzie.
 1688. SIR GEORGE MACKENZIE (2d time), on the dismissal of Dalrymple.

Sir John Nisbet is the last Lord Advocate who at the same time is a judge of the Court of Session.

Mackenzie dismissed, May 1686. Sir George Lockhart, President of the Court of Session, is directed to act as Lord Advocate, "that the royal prerogative suffer no diminution."

THE REVOLUTION.

1689. SIR JOHN DALRYMPLE (2d time).
 1692. SIR JAMES STEWART, on the retirement of Sir John Dalrymple.
 1709. SIR DAVID DALRYMPLE, on the dismissal of Stewart.
 1711. SIR JAMES STEWART (2d time), on the dismissal of Dalrymple.
 1714. THOMAS KENNEDY.
 1714. SIR DAVID DALRYMPLE (2d time), on the retirement of Kennedy.
 1720. ROBERT DUNDAS of Arniston, on the retirement of Dalrymple, who became an Auditor of Exchequer.
 1725. DUNCAN FORBES, on the retirement of Dundas.
 1737. CHARLES ERSKINE of Tinwald, on the retirement of Forbes, who became Lord President of the Court of Session.

1707. Soon after the Union a Secretary of State for Scotland is appointed. 1709, Abolition of the Privy Council of Scotland.

1st May 1713, Death of Stewart. A vacancy in the office of Lord Advocate till 30th March 1714, when Kennedy is appointed.

August 1725, Office of Secretary of State for Scotland abolished by Sir Robert Walpole. It is revived again from 1731 to 1739.

1742. ROBERT CRAIGIE of Glendoick, on the retirement of Erskine.
1746. WILLIAM GRANT of Prestongrange, on the retirement of Craigie.
1754. ROBERT DUNDAS of Arniston, on the retirement of Grant, who became a Judge of the Court of Session.
1760. THOMAS MILLER of Glenlee (Baronet 1788), on the retirement of Dundas, who became Lord President of the Court of Session.
1766. JAMES MONTGOMERY of Stanhope (Baronet 1801), on the retirement of Miller, who became Lord Justice-Clerk.
1775. HENRY DUNDAS (afterwards Viscount Melville) on the retirement of Montgomery, who became Lord Chief Baron of the Court of Exchequer.
1783. HON. HENRY ERSKINE, on the retirement of Dundas.
1784. ILAY CAMPBELL (Baronet 1808), on the retirement of Erskine.
1789. ROBERT DUNDAS of Arniston, on the retirement of Campbell, who became President of the Court of Session.
1801. CHARLES HOPE, on the retirement of Dundas, who became Lord Chief Baron of the Court of Exchequer.
1804. SIR JAMES MONTGOMERY of Stanhope (second Bart.).
1806. HON. HENRY ERSKINE (2d time), on the retirement of Montgomery.
1807. ARCHIBALD CAMPBELL (afterwards Colquhoun), on the retirement of Erskine.
1816. ALEXANDER MACONOCHE, on the retirement of Colquhoun, who became Lord Clerk Register.
1819. SIR WILLIAM RAE, on the retirement of Maconochie, who became a Judge of the Court of Session.
1830. FRANCIS JEFFREY, on the retirement of Sir William Rae.

1742, Marquis of Tweeddale appointed Secretary of State for Scotland. 1746, Office finally abolished at the close of the Rebellion.

The entire patronage of Scotland handed over by Government to Lord Advocate Dundas in 1782.

ERRATA.

Vol. I. p. 335, line 16, *for* Hugh *read* Hew.

Vol. II. p. 48, note 2, *for* poindage *read* porridge.

„ p. 266, line 16, *for* observed *read* deserved.

CHAPTER I.

INTRODUCTION.

IN June 1488 James the Third of Scotland took arms against his son and the rebel peers who were encamped on the fields of Stirlingshire. In the battle of Sauchie Burn the royal army was defeated, and the King, having fallen from his horse, was treacherously murdered. Among the barons who shared the fortunes of James on that disastrous day, and who were left to the vengeance of his victorious enemies, was Sir John Ross of Montgrenan, the King's Advocate.

Montgrenan Castle, which Timothy Pont describes as "an old strong donjon, well and pleasantly planted," was in Ayrshire; and the name of Sir John Ross stands on the roll of the Scottish Parliament, doubtless as member for that county, on the 6th of April 1478. He is the first King's Advocate whose name is known; but it does not appear when he was appointed. In June 1479 he was witness to a summons against John Ellem of Butterden, and others, for treasonably holding the Castle of Dunbar against the King. In October of that year, when Parliament met, Ellem and his companions did not surrender themselves for trial; and the record bears that "The Advocate" called on the House to give judgment against them.¹ The accused were

¹ Act. Parl. Scot. ii. 125.

found guilty, and their estates were forfeited to the Crown. Ross is not named as Advocate for the King in this case. But, on the 8th of July 1483, when the Duke of Albany failed to appear in answer to a summons of treason, "In the name and behalf of our sovereign lord, Johne the Ross of Montgrenan, as aduocat to his hienes," craved the judgment of Parliament, which was given against Albany.¹

In 1486 Ross was sent as an ambassador to the Court of Henry the Seventh.² In the following year, when Parliament rose on the 27th of January, he was put on the Committee which was to exercise the functions of Parliament till May, when the Estates were to reassemble.³ But Parliament did not meet till after the untimely death of James the Third.

It was the policy of the young King's advisers to punish all who had opposed the rebellion; and Ross was one of those on whom their vengeance fell. The King's Advocate had not only been in arms, but had, by his conspicuous bravery, endangered the life of the Prince.⁴ The fact that, as one of the late King's officers, he was bound to serve him, was held to be no defence. He was accused of treason; a warrant was granted for his apprehension; and Carrick, pursuivant, summoned him at Montgrenan and at the Cross of Irvine, to appear for trial before the High Court of Parliament.

He did not appear; and the Lord Chancellor moved for sentence against him. He was condemned to death; and all his lands and offices were forfeited to the Crown.⁵ This unjust sentence was pronounced on the 14th of October 1488. On the same day the lands of Montgrenan were granted by royal charter to Patrick Hume of Fastcastell.⁶

¹ Act. Parl. Scot. ii. 151.

² *Fœdera*, xii. 235-316.

³ Act. Parl. Scot. ii. 184.

⁴ Tytler, *Hist. Scot.* iv. 336.

⁵ Act. Parl. Scot. ii. 205; Pitcairn, *Crim. Trials*, i. i. 8-11.

⁶ *Registrum Magni Sigilli Regum Scotorum*, 1424-1513, p. 377.

But Ross, when in England on the embassy of 1486, had gained a powerful friend. The story of his condemnation reached the ears of King Henry, who wrote to Pope Innocent the Eighth on his behalf, in the following terms: "Our affection for the memory of James King of Scots causes us not only to lament the shameful murder of that prince, but to commiserate his faithful attendants, who by no fault of theirs have incurred the calamity of exile, and are unjustly punished. Therefore, as Sir John Roos, of Montgrinen, Knight, a native of Scotland, illustrious for military science and moral probity, and who was sent ambassador to us to perpetuate the peace between ourselves and his late prince, has been doomed to exile—not from any fault or misdemeanour, but merely for this one reason, that like a faithful servant he adhered to his Sovereign—we implore you to write to the King now reigning over the Scots to receive Sir John Roos into his kingdom, and restore him to his former estate."¹

The Pope seems to have used his influence on behalf of Ross, who attended the Parliament of 1489, and was appointed a Lord of the Articles and a member of the Secret Council.² In October 1490, he was elected one of the Lords of Council and Session; and in the following month the lands and castle of Montgrenan were restored to him.³ He seems to have transacted public business till his death, which must have taken place before the 12th of March 1495; for on that day Thomas Ross, probably his son, granted the estate of Montgrenan to John Lord Semple.⁴

Such were the chief events in the life of the first King's Advocate whose name has been preserved. The date at which the office was instituted is unknown. The Con-

¹ Cal. Venetian State Papers, i. 177.

² Act. Parl. Scot. ii. 216, 217, 220.

³ Acta Dom. Concilii, 143; Regist. Magni Sigilli, 1424-1513, p. 417.

⁴ Regist. Magni Sigilli, 1424-1513, p. 476.

stable, the Chancellor, and the Justiciar were officers of the Crown from a remote period. The Chamberlain had the control of the royal revenues from the reign of David the First to that of James the First. James the First instituted the offices of Treasurer and Comptroller. In the early exchequer rolls of Scotland we find payments made to these officers and others, such as the Keeper of the Privy Seal and the Secretary. But no fees are entered as paid to the King's Advocate, whose name first appears in public records in 1479 and 1483.¹

The term "advocate" had been used in Scotland for a long time; and in the reign of Alexander the Third the right of advocates to plead was secured by law.² In 1424, under James the First, it was ordained that "leal and wise" counsel should be appointed to assist poor suitors.³ During this period there is no trace of a King's Advocate. But as private persons employed advocates to represent them, it was natural that the King should do the same.⁴ The lawyer who was so employed would soon be known as the "Kingis Aduocat." To some extent the idea of having such an officer may have been borrowed from abroad. The long series of alliances between France and Scotland imported many French ideas into the Scottish Courts; and the King's Advocate may have been intended to take the place of the Procureur du Roi.

Whatever may have been the origin of the office, whether

¹ *Supra*, pp. 1, 2.

² "Statuimus quod in placitis nostris nullus loqui audeat de hoc quod tangat causam nisi tantummodo actor et reus aut eorum aduocati;" Statuta Gilde; Act. Parl. Scot. i. 435.

³ Act. Parl. Scot. ii. 8.

⁴ The accounts of the dowry lands of Mary of Gueldres, Queen of James the Second, audited 25th February 146½, contain an entry of a payment made "Magistro Gilberto Heryng, advocato domine regine, venienti de Edinburgh versus Fauceland," etc.—Exchequer Rolls, vii. 59. The advocate here spoken of may not have been employed regularly as "Advocatus Reginæ," but the transition from occasional employment by the Crown to the position of a recognised official would be natural and easy.

it was of French derivation or of native growth, the first authentic traces of its history are found towards the close of the fifteenth century. I have already mentioned that Sir John Ross of Montgrenan is first named as King's Advocate on the occasion of the Duke of Albany's forfeiture in 1483. He then appeared as prosecutor on behalf of the Crown. But it must be remembered, in considering what were the powers and functions of the Advocate at this date, that he was not Public Prosecutor in the modern sense of that phrase. We shall afterwards see how the office of Public Prosecutor was created by Statute in the reign of James the Sixth, and given to the Treasurer and Advocate jointly. But in the fifteenth century there was no Public Prosecutor in Scotland. The fundamental rule of Scottish criminal procedure was that all prosecutions proceeded at the instance of the person injured or his kinsmen. The accuser made his charge, and found security that he would follow it out. The accused was, in most cases, entitled to offer bail for his appearance on the day of trial.

In cases of treason or blasphemy the King alone was prosecutor. But two Statutes, of 1424 and 1436, provide for prosecutions at the King's instance in circumstances where private interests were concerned. One of these Statutes ordains that persons guilty of endangering the safety of crops by setting fire to grass or heath in their neighbourhood shall, if the owner of the land takes no steps to punish them, be indicted by the Justice's Clerk.¹ The other Statute imposes on the Sheriff the duty of prosecuting trespassers in the King's name.² These were cases in which the King could prosecute as well as the person injured; and yet the duty of representing him was laid on the Justice's Clerk or the Sheriff, and not on his Advocate, if there was a King's Advocate at that time.

¹ Stat. 1424, cap. 20.

² Stat. 1436, cap. 140.

In both criminal and civil cases, the King had an interest to appear.

In criminal cases he had a double interest ; first, as pursuing persons who were guilty of treason, an extensive term in those days, or of offences against public order ; secondly, to secure the fines or forfeitures of those who were prosecuted by private persons. Private prosecutors usually appeared in person at the bar. The King could not do so, and it was necessary that some officer should appear for him. This duty was imposed on the Advocate, but at what time it is impossible to say.

In civil cases the King pursued as a party in his own name. One of the most important civil actions at the instance of the Crown in the fifteenth century was in relation to the Mar Peerage. Sir Thomas Erskine was served heir to Isabel, Countess of Mar. In 1457 the King raised an action of reduction, based on various grounds, in which he challenged the right of Erskine, and sought to cancel the service. The case was tried by a jury at Aberdeen. The King himself was present. Erskine was represented by counsel. But no King's Advocate was present. The Lord Chancellor conducted the case on behalf of the Crown, and acted, in every way, as if he had been an ordinary advocate.¹ In 1491 actions against certain magistrates, for alienating the common good of their burghs, were raised in the name of the King and his Privy Council, and the judges held that "The King's grace and his Counsall hes gude actione and interes to caus the samin to be restorit and redressit *in integrum*."² Here again the King's Advocate does not appear.

¹ Lord Crawford, Earldom of Mar, i. 282-296 ; Antiquities of Aberdeen and Banff, iv. 205-212.

² Lord Medwyn's opinion in H.M. Advocate v. Dunglas ; Shaw, Court of Session Reports, xv. 314 ; Balfour, Practicks, 45.

But after the close of the fifteenth century the Advocate becomes a prominent figure in the public life of Scotland. His duties were not merely legal. That combination of political and legal functions, which has given rise to frequent discussion, characterised the office of King's Advocate from the time at which its authentic history begins. The Advocate was never merely a law officer. He took a leading part in the general business of Government. But, although he had access to the royal presence, he was not a member, by virtue of his office, of the Privy Council. Nor was he an Officer of State until the middle of the sixteenth century; yet there is good reason for thinking that he had a seat in Parliament, as King's Advocate, from a much earlier period. He was constantly employed on diplomatic business. Sir John Ross, it has been seen, owed the restoration of his fortunes to the fact that he had been sent as an ambassador to England; and his successors were frequently despatched on missions of the same kind.

The immediate successors of Ross were James Henderson of Fordell, Richard Lawson of Hariggs, and James Wishart of Pittarrow.

It has been said that Henderson was the son of Robert Henderson, the poet-schoolmaster of Dunfermline; but this is doubtful.¹ He appears as King's Advocate in 1494; but he may have performed the duties of that office soon after the forfeiture of Sir John Ross. In 1498 he received the grant of an annual salary of forty pounds.² In 1506 he is spoken of as the King's Secretary and Advocate, "*Clericus et Advocatus*."³

¹ Robene and Makyne and the Testament of Cresseid, by Robert Henryson (Ban. Club, 1824), Pref. ix.

² "Rex dedit literam M. Jacobo Hendersoun, advocato suo, pro servitio sibi impenso,—de annua pensione 40 librarum de thecis regis persolvenda durante ejus vita, vel donec rex ipsum provideret de terris ad dictum valorem pro ejus vita possidentis."—Regist. Magni Sigilli, 1424-1513, p. 524.

³ *Ibid.* p. 634.

Richard Lawson was owner of the lands of Hariggs.¹ His name appears frequently on the rolls of Parliament; and he was several times returned as one of the members for the burgh of Edinburgh.² He became Justice-Clerk in 1488; and was one of the politicians who formed James the Fourth's Council of State. In 1503 he was appointed King's Advocate, along with Henderson; and he held the offices of Advocate and Justice-Clerk till his death in 1507.³

On the death of Lawson, Henderson became Justice-Clerk, and continued Advocate and Justice-Clerk till 1513, when, along with his eldest son, he perished on the field of Flodden.⁴

Wishart of Pittarrow probably became joint King's Advocate, with Henderson, on the death of Lawson; and he appears to have been Advocate and Justice-Clerk, after the latter office became vacant by the death of Henderson. He was descended from William Wishart, Archbishop of St. Andrews and Chancellor of Scotland in the reign of Alexander the Third; and, in addition to the family estate of Pittarrow, he acquired, in 1511, the lands of Carnbegs.⁵ He does not, however, seem to have died a rich man. On the 14th of November 1524 his name appears on the rolls of Parliament.⁶ But on the 22d a grant is made by the Privy Council to Elizabeth Lermonth, "relict of the late Master James Wishart of Pittarrow, Clerk of Justiciary and Advocate to the King's grace, and to the said Elizabeth's small fatherless bairns, *to help to put them*

¹ Or Highriggs. "The lands where Heriot's Hospital now stands. There is a narrow street, a little to the west, which still goes by the name of Lady Lawson's Wynd."—Douglas, Baronage, 581.

² Parl. Papers, 1878, lxii. ii. 525-6.

³ It was the custom to have two King's Advocates; "Advocati Regis, quorum *ferè semper* erant duo simul."—Balf. MSS. Advocates' Library, 33. 2. 7.

⁴ Doug. Baronage, 518.

⁵ Regist. Magni Sigilli, 1424-1513, p. 780.

⁶ Act. Parl. Scot. ii. 284.

to profit, for the said late Master James' good and thankful service done to the King's Highness and his dearest mother, the Queen's grace."¹ The "small fatherless bairns," for whom provision was made, were John and George Wishart, sons of the late Advocate by his marriage to Elizabeth Lermonth, of the Fifeshire family of Balcomie. They both rose to eminence. John became Comptroller of Scotland and a Privy Councillor, in the reign of Queen Mary. George was afterwards "Maister George Wishart, commonly called Mr. George of Bennet's College," the Cambridge student who was "courteous, lowly, glad to teach, desirous to learn," the friend of Knox, and the victim of Cardinal Beaton.

Wishart's successor was Sir Adam Otterburn, who appears as King's Advocate, in a civil case, on the 4th of December 1524.²

In the following chapters I shall endeavour to give an historical sketch of the Advocates and their office. During the sixteenth century the office gradually rose in importance; the Advocate became Public Prosecutor, and a great Officer of State. In the reign of Charles the First the right of appointing the King's Advocate was taken from the King and given to the Parliament. Under the Commonwealth the King's Advocate became the "Advocate to the Lord Protector." At the Restoration the right of appointment was, by an Act of the Estates, restored to the Crown. During the period between the Restoration and the Revolution the Advocate's office was hated, as the instrument of outrages committed in the name, but not always under the forms, of Law. The Revolution, the Union, and the abolition of the Scottish Privy Council, each affected the position and powers of the Advocate. In the eighteenth century the office of special Secretary of State for Scotland was abolished, and the management of Scottish business was vested in the Ministers,

¹ Regist. Secreti Sigilli, vii. 101.

² Acta Dom. Concilii, xxxv. 177.

who acted under the advice of the Lord Advocate, by whom, as time went on, more and more influence in political affairs was acquired. I shall attempt to trace the progress of these events, to give some account of the personal history of the Advocates, and to note, from time to time, those decisions of our Courts which have defined their powers, or illustrated the growth of those departments of the law with which their office is concerned.

CHAPTER II.

THE SIXTEENTH CENTURY.

SIR ADAM OTTERBURN of Auldhame and Redhall, who became King's Advocate on the death of Wishart, was the son of Thomas Otterburn, a merchant-burgess of Edinburgh who had died at Flodden. He had been in public life for some years before his appointment as Advocate. In 1518 he was one of the Commissioners appointed to manage the estate of Margaret, widow of James the Fourth, and wife of the Earl of Angus. Soon after he was employed as an ambassador. Diplomacy at that time presented an ample field for the energies of any ambitious man. The King was a minor. The country was torn by contending factions. Albany, Arran, and the Douglasses were striving for the mastery. Threats of war and diplomatic intrigues occupied the statesmen of England, Scotland, and France. Many of the Scottish nobles were in the pay of England. The Queen-Mother was in correspondence with Dacre. This state of affairs led to a constant interchange of diplomatic missions, and in the perpetual comings and goings of ambassadors between the Courts of England and Scotland, Otterburn took a leading part. In 1521 he was one of the ambassadors sent to England to treat for peace, and during the rest of his life he was more famous as a diplomatist and politician than as a lawyer.¹

¹ Brunton and Haig, Senators of the College of Justice, 25 ; Rymer's *Fœdera*, xiii. 735.

In the office of King's Advocate he had a colleague, Sir James Foulis of Colinton. Foulis was the son of an Edinburgh tradesman, who had married the daughter of Henderson of Fordell, Advocate to James the Fourth. He appears to have been a trustworthy and efficient public servant. After acting for about five years as joint Advocate with Otterburn, he was appointed Clerk Register. In 1532 he was made a Judge of the Court of Session, an appointment which he held, along with that of Clerk Register, till his death, which must have taken place before the 4th of February 1549, as his widow is spoken of in an Act of Sederunt of that date.¹

Although the Commission under which Otterburn and Foulis were appointed was to "James Foulis and Adam Otterburn, conjointly and severally, and the longest liver of them two, to be Advocates to the King," the position of Foulis was subordinate to that of Otterburn, whose conspicuous abilities gave him a far more prominent place in the service of the State than that occupied by his colleague.

Previous to his appointment as Advocate, Otterburn had been chosen Provost of Edinburgh, and it is said that he made, while holding that office, "great labour" to suppress the plague of 1529.²

It was during Otterburn's term of office as King's Advocate that the College of Justice, now better known as the Court of Session, was instituted. Means were taken, in the Act of institution, to secure the King's influence over the deliberations of the Court by the presence, as a judge, of his Advocate.

The original theory of the Scottish Constitution was that

¹ Brunton and Haig, 29, 30; Nisbet, Heraldry, Append. 18; Acts Sed. ed. 1811, 53. In 1529 Foulis acted as private secretary to James v.

² Diurnal of Occurrents, 14.

the King was supreme in all civil and criminal causes. He did often sit on the bench. But from an early period the duties of supreme judge were performed by a great officer, known as the Justiciar, or Justice-General, of Scotland. Subordinate officers, known as the Justice's Deputes, performed the duties of the Justice-General in his absence, or sat in judgment along with him, should he desire their presence. These deputy or substitute justices were appointed either by the King or by the Justice-General.¹ The jurisdiction of the Justice-General was at one time both civil and criminal. In civil cases there was an appeal to the Estates of Parliament or to the Privy Council of the King. But although from an early period the Kings of Scotland had these courts of law, which were probably regarded as supreme, a network of hereditary jurisdictions was spread over the whole country. Not only were these jurisdictions, under their various titles, exercised independently of the King's Courts, but if the vassal of one feudal lord was accused before another, he could be "replegiated," or claimed, for the purpose of being tried in the Court of his own superior.² The possessors of these heritable, or hereditary, jurisdictions were, for the most part, petty tyrants, ignorant and brutal, under whose exactions it was impossible that the people could be happy or contented. There was, indeed, a right of appeal to the King's Courts; but this right was seldom exercised, as the great barons had generally sufficient influence to procure a judgment against the appellant.

By a series of Statutes, dating from the reign of James the First, the aristocracy of Scotland had gradually been

¹ Hume, Commentaries, i. 1-13.

² The King's Advocate appears to have claimed a voice in questions of replegiation. He sometimes objected and sometimes consented to the accused being claimed from one Court to another: cases of Scott, 25th June 1557 (Pitcairn, i. i. 400) and Cockburn, 10 Jan. 1580-81 (*ibid.* i. ii. 93).

deprived of that control over the administration of justice, which had been so fertile a source of tyranny and oppression. In 1425 James the First appointed a select Committee of Parliament, the members of which, under the name of Lords of Session, held three terms or sessions in the year. Each session lasted forty days. The Old Court of Session, as this Committee of Parliament is styled, held its sittings in whatever places the King desired. James the Fourth created another judicial body, the Lords of Daily Council. This Court had the same powers and functions as the Lords of Session, but was not chosen from the Estates of Parliament. It sat daily in Edinburgh. James the Fifth established the present Court of Session, which embraced all the powers and functions of the Lords of Session and the Lords of Daily Council. It consisted of fourteen judges and a president. Of the fourteen judges seven were churchmen, and seven were laymen. The president was a churchman. The Lord Chancellor of Scotland, when present, took the chair, and was, in some instances, himself a member of the Court. The first meeting of this tribunal was on the 27th of May 1532, and it has been the Supreme Court of Scotland ever since, except during the Commonwealth, when its place was taken by the "Commissioners for the Administration of Justice to the People of Scotland."

Although the Court of Session was instituted as a means of securing a fairer administration of the law, the Crown had, from the first, the means of influencing its decisions by the appointment of "Extraordinary Lords." These were members of the Privy Council named by the King to sit along with the ordinary judges. Though the number which the King might appoint was, by law, restricted to "three or four," seven or eight were, in point of fact, often nominated. But this was not the only source of royal influence in the

Court. In addition to this power of making judges at pleasure, the Crown used the office of King's Advocate as a means of securing its authority. Otterburn was called on to combine the duties of a Lord of Session with those of the King's Advocate, and took his seat on the bench at the first meeting of the Court. The plan of making the Advocate a judge, or giving the office of Advocate to one who was already on the bench, continued in frequent use till the latter part of the eighteenth century, and was regarded as a legitimate mode of increasing the power of the Crown. The King's Advocate thus occupied a position of peculiar importance. He sat on the bench as a judge, and he pleaded as an advocate both for private clients and as counsel for the King. When pleading, he did not mingle with the ordinary advocates, but had the privilege of standing within the bar.¹ Friday was put at his disposal for conducting causes in which the King was concerned, and on that day he could insist on the Court taking the Crown cases in any order he pleased.²

The King had thus complete control over the Court of Session. He could appoint extra judges, and his Advocate had a seat on the bench. Before long it was decided that all law-suits in which the King was a party must be raised in this Court. The judges held that "the Lordis of Sessioun alanerlie, and na uther inferior judge within this realme, ar jugeis to the Kingis actiounis: for his Hienes, nor his Advocat, may not be callit befor ony inferiour juge, bot befor thame alanerlie."³

The jurisdiction of the Justice-General and his Deputes in criminal cases had long been recognised. But at the beginning of the sixteenth century the judges of the Old Court

¹ Stat. 1532, cap. 67.

² Act. Sed. 13th June 1532.

³ 16th July 1534.—Morison, Dictionary of Decisions, 7321. It was some years after this that the Advocate began to pursue actions in virtue of a warrant under the sign-manual. 1st March 1546.—Morison, Dict. Decisions, 9089.

of Session, though they could not try a criminal case, asserted their right, after a criminal case had been tried before a criminal judge, to inquire whether that judge had acted according to the proper forms of law.¹ This power was also claimed by the new Court of Session, and was often used by the King's Advocate, down even to the time of Charles the Second, as a means of coercing both judges and juries, when the Crown was anxious for a conviction.

Otterburn stood high in the estimation of the King, who wrote on various occasions to Henry the Eighth, speaking of his Advocate as a man in whom he had the greatest confidence. In 1533 he was knighted, while in England on diplomatic business, and Henry Lauder of St. Germain's was appointed to act as Advocate during his frequent periods of absence on missions of a similar nature.²

The last diplomatic duty performed by Otterburn while he was King's Advocate was in 1535. In that year Henry sent Lord William Howard to Scotland, to propose an interview at York between himself and James. When this proposal was rejected by the Privy Council of Scotland, and Howard returned to his master, James sent Otterburn to the Court of Henry, charged with the delicate duty of persuading the English King that the Council had rejected his offer owing to the insolent manner in which Howard had spoken.³

The most remarkable criminal case which took place while Otterburn was King's Advocate was the trial of the Lady Jane Douglas, widow of Lord Glamis, on a charge of

¹ This decision was given on 5th Dec. 1500 : *Rex. v. Bailies of Haddington.*—*Mor. Dict.* Dec. 7318.

² In the Lord High Treasurer's accounts for 9th July 1534, there is a payment made "To Maister Adam Ottirburne, passand to Londone for tretting of the pece, and thare remanand fra the xxvj day of November to the thrid day of Junij last bipast, to his expensis vjc li."

³ Keith, *Hist.* 18.

having conspired to poison the King. In this case, though the charge was treason, we do not find the King's Advocate appearing. Lady Jane, whose exquisite beauty, dauntless courage, and melancholy fate make her one of the most picturesque figures on the stage of Scottish history, was accused by William Lyon, a relative of Lord Glamis, of having conspired, along with her second husband and others, to poison the King. The accuser, in making this charge, was prompted by private malice. Having failed in an attempt to seduce Lady Jane, who was as virtuous as she was beautiful, he resolved, in accordance with the savage spirit of the age, on this horrible mode of vengeance. The proceedings at the trial show that, even in the most important cases of treason, the King's Advocate did not always take the lead. It was Lyon who was most prominent in forcing the case to trial. It was he who prosecuted, and exerted all his ingenuity to obtain a conviction. Influenced by the eloquence of the accused, the judges represented to the King that, though the witnesses had sworn to the facts alleged by the prosecutor, they did not believe the evidence, and thought that sentence should be delayed in order to allow time for further inquiry. The King was on the point of yielding to this suggestion. But Lyon persuaded him to direct the judges to pronounce the sentence which the law required. It does not appear, from the time when the accusation was made till the ill-fated victim perished at the stake, that the King's Advocate was ever consulted on the case. Lyon, the private informer, was pursuer at the trial and adviser in the King's closet.

Otterburn was dismissed from office in 1538. It is supposed that the cause of his disgrace was an intrigue which he was said to have carried on with the Douglasses when in London.¹ Although Sir Ralph Sadler says that he was

¹ Pinkerton, ii. 350.

“noted to be of the Cardinal’s faction, and a great enemy to the King’s Majesty’s purposes,” it is certain that, in his correspondence with Secretary Cromwell, he expresses himself as very friendly to the English alliance.¹ He himself attributed his loss of the office of King’s Advocate to the King’s suspicion that he was “over-good an Englishman.”² He was, for whatever reason, dismissed from office, arrested, confined in the Castle of Dumbarton, and only set at liberty on condition that he would at once go to Fife, and remain there during the King’s pleasure. Henry Lauder succeeded him as Advocate.

James the Fifth died in December 1542, and after that event Otterburn reappeared in public life. In October 1543 he was re-elected Provost of Edinburgh, and sat in Parliament as member for that city.³ In the same year he was appointed, along with the Earl of Argyll and others, to meet ambassadors from France, and discuss the project of renewing the old treaties between that country and Scotland.⁴ In 1546, when the Castle of St. Andrews, occupied by Knox, Balnaves, and the murderers of Cardinal Beaton, was under siege, Otterburn was ambassador in London, and was desired by the Lord Chancellor to write to Arran, and request him to desist from the siege of the Castle, “as the persons in it are, and have been at all times, friends to the King of England.”⁵ By August of the following year he had returned to Scotland, and was engaged in constant official correspondence with France and England⁶ till his death, which took place in 1548.⁷ A letter, preserved in the Public Record Office, written from Berwick on 4th July 1548, mentions that Sir Adam Otterburn is “hurt in the

¹ Cal. State Papers, 1509-1603, i. 32.

³ Parl. Papers, 1878, No. lxii. ii. 532.

⁵ Cal. State Papers, 1509-1603, i. 60.

⁷ Brunton and Haig, 27.

² Sadler State Papers, i. 316.

⁴ Act. Parl. Scot. ii. 432.

⁶ *Ibid.* 65, etc.

head.”¹ This accident may have proved fatal, but of the cause of his death nothing certain is known.

Otterburn held a distinguished place among the statesmen of his day. He was, says Sadler, “reported to be a wise man as any was in Scotland.” Buchanan wrote an epigram in his honour,² and he himself is said to have been a poet.³ Sadler has recorded a conversation which he had with Otterburn when they were discussing the proposed marriage of Queen Mary to Prince Edward. Sadler was discoursing on the benefits which would ensue to the two kingdoms if the marriage took place, when Otterburn interrupted him by asking, “Why think you that this treaty will be performed?” “Why not?” said Sadler. “I assure you,” replied Otterburn, “it is not possible, for our people do not like it. And, though the Governor and some of the nobility, for certain reasons, have consented to it, I know that few or none of them like it; and our common people utterly dislike it.” Sadler said he could not understand this, considering that God’s providence had given England a young prince, and Scotland a young princess, by whose union in marriage, “thes two realmes being knytte and conjoynd in one, the subjects of the same, which have been alwaies infested with the warres, myght live in welth and perpetual peas.” “I pray you,” said the Scottish ambassador, “give me leave to ask you a question: If your lad were a lass, and our lass were a lad, would you then be so earnest in this matter? Could you be content that our lad should marry your lass, and so be King of England?” Sadler replied, “Considering the great good that might come of it, I should not show myself zealous for my country if I did not consent to it.” “Well,” said Otterburn, “if you had the lass and we the lad, we could be well content with it, but I cannot believe

¹ Cal. State Papers, 1509-1603, i. 90.

² Buch. Epigram. ii. 15, 16.

³ Dempster, *Historia Ecclesiastica*, vol. ii. 516.

that your nation could agree to have a Scot to be King of England. And likewise I assure you, that our nation, being a stout nation, will never agree to have an Englishman to be King of Scotland. And though the whole nobility of the realm would consent to it, yet our common people, and the stones in the street, would rise and rebel against it.”¹

These are brave words. But we are told by an old chronicler that, when the English landed at Leith in the summer of 1544, and marched on Edinburgh, “the town of Edinburgh came furth in their sight, but the provost, Mr. Adam Otterburn, betraist them, and fled hame.”²

Of Otterburn’s private life little is known. He was twice married. His first wife was Janet Rhynd, and his second Eufamia Moubray, both of whom he must have survived, as, for the safety of their souls, he gave forty solidi to the altar of the Virgin Mary in St. Giles.³

It has already been mentioned that Henry Lauder of Saint Germain’s was appointed to act as Advocate in place of Otterburn, in 1533. Lauder was, at that time, merely a substitute or deputy Advocate.⁴ But in 1538, when Otterburn was dismissed from office, Lauder presented a letter

¹ Sadler State Papers, iii. 325, 326.

² Diurnal of Occurrents, 31.

³ Hay MSS. ii. 174, Advocates’ Library, 34. 1. 9.

⁴ Act of Sederunt, 5th December 1533. Scotstarvet (Stag. State, p. 184) says Lauder was “conjunct with Otterburn in 1533,” but this is a mistake. In the Act of Sederunt of 5th December he is styled, “Advocate to our Sovereane Lorde, in absence of Maister Adam Ottirburne of Auldham,” and it is distinctly said that “our Advocate is now to pass in our service in England,” and cannot, therefore, attend to the King’s business. Hume gives 1582 as the date of the first appointment of an Advocate-Depute recorded in the books of the Criminal Court: “The first deputation I have found upon record is in favour of Mr. John Russell, dated 2d May 1582.”—Hume, Commentaries, ii. 132. There was, at least, one appointment as Advocate-Depute previous to 1582, namely on 7th November 1544, when Mr. Thomas Kincaig was appointed “Advocate to the Queen’s Grace, and him, in absence of Mr. Henry Lauder, principal Advocate.” Act. Parl. Scot. ii. 447. In a manuscript list of King’s Advocates, by Sir James Balfour, it is noted, “6th Nov. 1544, Mr. Thos. Kincaig made *Depute Advocate* by the Governor in Parliament.”—MSS. Advocates’ Library, 23. 2. 7.

from the King, directing the Chancellor, President, and Lords of Council and Session to "admit our louit familiar clerk, Maister Henry Lauder, our aduocat, to sitt and remane in our Counsal-hous, to heir and see deliuering of billis, geving of interlocutouris, decisionis, and determinacionis of all causis ande accionis, sua that he may heir and knaw sik thingis as sall happin to occur that concernis ws, exceptand always the acciounis and causis, for the quhilkis he beis aduocat and speikis for at the bar alanerly."¹ He was then sworn to secrecy, and admitted to sit with the judges.²

Lauder held office as sole Advocate from this time till 1555, when John Spens of Condie was conjoined with him. Of Lauder's personal career little is known. He was one of nine advocates appointed to plead by the Court at the foundation of the College of Justice. He was made King's Advocate, as we have seen, in 1538. He was raised to the bench in March 1540. He died in July 1561.³

But although little is known of the private history of Lauder, the office of King's Advocate advanced in dignity and power during the time he held it. It is in 1540 that the Advocate first appears on the rolls of Parliament as an Officer of State. In the sederunts of 10th December and 14th March of that year "M. hēric^e Lauder" appears on the rolls of Parliament along with the great Officers of State.⁴ In Scotland the Officers of State were always members of Parliament *ex officio*, in addition to the peers, and the representatives of shires and burghs. The date at which this custom began is unknown.⁵ It was a great source of

¹ Act of Sederunt, 20th January 1538. His appointment was made on 10th September 1538.—Regist. Sec. Sigilli, xii. 25.

² Hailes' Catalogue, Note 10.

³ Brunton and Haig, 63.

⁴ Act. Parl. Scot. ii. 355, 368. The term "*officiarii*" was not used, however, till 1565.

⁵ Wight, Rise and Progress of Parliament, 66.

the King's influence over the deliberations of the Estates. The sittings of Parliament were of short duration. Many questions were referred to Committees, with powers equal to those of Parliament.¹ Of these Committees the Officers of State were almost invariably members, and in Parliament the votes of these official persons derived additional value from the small attendance of freeholders. It is said that during the reign of James the Third the greatest number present was thirty, during the reign of James the Fourth twelve, and that in the reign of James the Fifth only two or three attended.²

From 1540 till the Union in 1707, except for a short time during the reign of Charles the First, the King's Advocate sat in Parliament without election. His position as an Officer of State not only gave him a seat in Parliament, but carried with it the right of voting with the Lords of the Articles, that Committee, chosen at the commencement of each Parliamentary session for the purpose of preparing measures for the consideration of the Estates, whose constitution was so anomalous, whose powers were so extensive, and whose inroads upon the functions of Parliament were so keenly resented by the people of Scotland.

The recognition of the King's Advocate as an Officer of State was naturally followed by his admission to the Privy Council. Before Lauder's time the Advocate was not, as a matter of course, a member of Council, although Otterburn, his predecessor, had enjoyed that honour. But in the Parliament of Mary, held in March 1543, when the Estates had ratified the appointment of Arran as tutor to the infant Queen and Governor of the Kingdom during her nonage, the Privy Council was reconstituted under the

¹ Wight, *Rise and Progress of Parliament*, 79.

² *Ibid.* 58; *Parl. Papers*, 1878, No. lxii. ii. 518, etc.

title of the Lord Governor's Council. Of this body Lauder was a member as Queen's Advocate.¹

The position of the Advocate as a Privy Councillor was finally established a few years later, when it was ordained that the Treasurer, Secretary, Comptroller, Clerk of the Council, Advocate, and Justice-Clerk, "be of Council and remane continuallie thairupoun."² From that time the Advocate is found in constant attendance, in the Register of the Privy Council, as a member of the various administrations which contended for power during the reign of Mary and the minority of James.

In Lauder's time an innovation was made in the law of treason, which introduced an element of extreme severity into that branch of Criminal Jurisprudence with which the King's Advocate was then specially concerned. The penalties for treason were already sufficiently harsh. But in 1540 there took place the trial and forfeiture of Robert Lesley, a dead traitor. The mode of procedure, in this trial after death, was repulsive. The body of the accused was raised from the grave, and produced at the bar of the Court. Doom was pronounced over it, in presence of the dead man's heirs, who were cited to appear for their interests, and save, if they could, their estate from forfeiture. But, even at that early period, the Courts were not altogether superior to the voice of popular censure. There were murmurs against what had been done, and those who had most reason to fear lest the law of treason should some day reach their own families, were the very persons to whose complaints the Crown could not be entirely indifferent. It was decided that the procedure at Lesley's trial must be ratified and approved by Parliament. The King's

¹ Act. Parl. Scot. ii. 414. The other Officers of State upon the Council were the Treasurer, Secretary, Clerk Register, and Justice-Clerk. There were twenty-nine members, of whom six formed a quorum.

² Privy Council Minute, 5th June 1546.

advisers well knew that, however angry individual members of Parliament might be, none would dare openly to oppose the wishes of the Crown. On the pretext, therefore, of a desire to govern with the advice of the Estates, James directed that the subject should be brought under the notice of Parliament. On the 10th of December, Lauder, in the King's presence, explained to the House what had been done in Lesley's case. He stated that in consequence of murmurs which had reached the King's ear, and "for stanching of sik murmure," the King desired the Estates to consider the subject, "that his Grace may have sensemente of Parliament, quhidder that he hes ane action to perseu sik summondes or not." The answer given to this appeal from the King's Advocate justified the calculations of the Council. The whole Estates of Parliament, spiritual and temporal, unanimously declared that the trial of a dead traitor, and the forfeiture of his heirs, were in conformity with law, equity, and reason, "notwithstanding that there is na special lawe, acte, nor provision of the realme, made thereupon of before."¹ In spite of this declaration of Parliament, much dissatisfaction was felt; and in 1542 an Act was passed to amend the law. Under this Statute no trial could take place after the death of the accused, unless his treason had been notorious during his lifetime; and after a lapse of five years from the date of death no trial could, in any case, take place.²

In the annals of the King's Advocates, Lauder comes upon the scene and leaves it with no personal interest attaching to his career. He is made an Officer of State and a Privy Councillor. He inaugurates an era of new horror in the grim history of our criminal law. We know

¹ Act. Parl. Scot. ii. 356.

² Stat. 1542, cap. 13, Act. Parl. Scot. ii. 415. This Statute was not printed till 1814. Hume, i. 539-40; Mackenzie on Crimes, Tit. vi. sect. 22; Observations, 136.

that for a quarter of a century he played a part in the eventful drama of Scottish politics. . He was in office during the chief crisis of our ecclesiastical history; but of his character as a man we know nothing. He is merely the representative of his office, which gained fresh powers during the time he held it. It is otherwise with his successors,—Spens of Condie, “a man of gentill nature, and ane that professit the doctrine of the Evangell,” and Crichton of Eliok and Cluny, the father of the Admirable Crichton.

John Spens, who was conjoined as Advocate with Lauder on the 21st of October 1555,¹ was the son of John Spens of Condie, in Perthshire. He was born in 1520, and educated at St. Salvator's College in St. Andrews. In March 1549 he was one of nine advocates who were appointed by the Court of Session to plead before them in all causes. Six years later he became joint Advocate with Lauder, after whose death, in July 1561, he was made a judge, an office which he held along with that of Advocate. Lauder had probably retired from his place as King's Advocate in 1559, as on the 8th of February of that year Robert Crichton was appointed joint Advocate with Spens.²

Crichton was a descendant of Sir Robert Crichton of Sanquhar, who acquired the estate of Eliok in 1453, and was the father of the first Lord Crichton, Chancellor in the reign of James the Second.³ In addition to the estate of Eliok, the King's Advocate acquired the property of Cluny from his brother George, Bishop of Dunkeld, who, according to Tytler, “foreseeing the dilapidation of the benefices of the prelates, which was likely to follow the change of the national religion, and dreading the total loss of the lands and castle of Cluny, attached to the See of Dunkeld, con-

¹ Regist. Sec. Sigilli, xxvii. 126.

² *Ibid.* xxx. 21.

³ Tytler, Life of the Admirable Crichton, 160, 161.

veyed to his brother, the Lord Advocate, the whole of his portion of the barony of Cluny, with the singular reservation, that it should be allowable for the Bishop to resume the possession at any future period.”¹

Spens and Crichton were joint Advocates from 1560 till 1573. Their term of office affords many illustrations of the duties, legal and political, of the King's Advocate at this time. In the Criminal Courts, the injured party, or his relatives in the case of murder, usually stood at the bar, either alone or accompanied by “Prolocutors,” or Counsel. In many cases the Advocate concurred in the prosecution, and his name appears on the record after those of the prosecutor and his friends. Sometimes, if not always, the Advocate was present in obedience to a special warrant from the Crown. Such a warrant was necessary in civil cases, and it is possible that, at this period, it was the custom to grant one in all criminal cases also. What the practice was cannot now be accurately ascertained. But in many cases a warrant was given. For instance, at a trial for murder in December 1561, the Advocate produced a warrant from the Queen, directing him to assist in the prosecution, and see that justice is done. In this case he seems to have concurred with the private prosecutor, and to have given him assistance in conducting his case. In the same year, at the trial of James Fentoune for the murder and mutilation of the son of the laird of Logy-megill, the laird and a surviving son appeared for the prosecution. On the first day, when the accused was admitted to bail, Crichton was present, and stated that he appeared for the Queen and her interest only. A fortnight later, on the day of trial, the accused surrendered to his bail. On this occasion there was no appearance for the Crown.² But it is probably correct to suppose that,

¹ Tytler, *Life of the Admirable Crichton*, 8, 9.

² Pitcairn, *Crim. Trials*, i. i. 408, 438.

though the Advocate was not yet Public Prosecutor, and though he did not always concur with the pursuer, he was nevertheless, in the majority of cases, cognisant of the proceedings, and ready to concur if it was thought necessary.

Difficulties often arose from the separate interests of the public and private prosecutors. In December 1580 Lord Ruthven, at that time Lord High Treasurer of Scotland, and others, were tried for murder, and certain offences, one of which was wearing and using pistols, contrary to an Act of Parliament. For the prosecution there appeared Lord Oliphant, William Now, "Officiar," and Crichton, "Advocat, pro rege." The Advocate produced a precept or letter signed by his Majesty and two of the Privy Council, charging him to insist in the prosecution. Before the trial began Lord Oliphant stated that he passed from the pursuit for the time,¹ "in respect that Mr. Robert Crichton, Advocate, would not use his information." The meaning of this statement was that the Advocate did not intend to take proper means to obtain a conviction. It may be inferred from this that when the Advocate appeared he had the control of the case, and that the hands of the private prosecutor were tied. Lord Oliphant further protested, "that whatever the Advocate did in the pursuit of the accused should not prejudice or hurt his action, but, when time and place shall serve, he may pursue the same according to the laws of this realm." His protest having been recorded, the private prosecutor withdrew. The King's Advocate produced nothing in support of the prosecution, except the indictment and the King's letter directing him to prosecute. These were handed to the jury, who retired to consider their verdict. Presently a juror, sent by the foreman, returned and asked if the Advocate had any further evidence to produce. The Advocate

¹ In legal language, "deserted the diet *pro loco et tempore*."

replied that he had not, and the jury acquitted the prisoner on the ground that there was no evidence.¹

An incident which took place at this trial shows the loose way in which the Criminal Statutes were administered. Lord Ruthven alleged that he and the other prisoners ought not to be tried on the charge of wearing pistols, as they held a licence from the King to infringe the Act of Parliament. The licence was produced and that charge was given up.

Spens took an active part in the work of the Reformed Church, whose doctrines he had embraced. His name occurs, from time to time, in connection with the new establishment of religion. In particular, he was a leading member of the Commission which was appointed in January 1562, with power to call to Edinburgh and examine all prelates and other persons holding benefices, in order to obtain full returns of Church property.² It is not surprising to find that he had some difficulty in reconciling his sympathy with Knox and the reformers with the performance of his duty as Advocate to Queen Mary. In August 1563 the Queen left Edinburgh for a time. During her absence, those members of the household who remained at Holyrood were in the habit of attending service in the Chapel-Royal, where a priest conducted the ritual of the Romish Church. Many citizens attended this service. The townsmen took offence; and one Sunday a number of them went down to Holyrood, and demanded entrance to the chapel. This was refused. The door was at once forced, and the crowd bustled in. The priest was at the altar. A townsman rushed up to him, and exclaimed, "The Queen's Majesty is not here; how dare you to transgress the law?" The service was stopped. Madame Raullet, mistress of the Queen's maids, sent a

¹ "Seing na verificatioun schawin to thame, nor zit na persoun swerand the Dittay."—Pitcairn, *Crim. Trials*, i. ii. 90.

² Minute of Privy Council, 24th Jan. 1562.

hurried message to the Comptroller. It was Communion Sunday, and he was at St. Giles'. Instantly leaving the church, he rushed down to Holyrood, taking with him the Provost and Magistrates. All was quiet when he arrived, but two of the rioters were afterwards arrested on a charge of violently invading the palace.¹ The Queen was enraged at this uproar and "convocation of the lieges" which had taken place at her gates. The reformers were afraid that violence might be attempted against the men who had been arrested. Knox, at the request of his friends, wrote a letter to the Protestant leaders, asking them to attend the trial of the accused. A copy of this letter found its way into the Queen's hands. Mary read it with joy: Knox was at her mercy at last. The Council pronounced it treasonable. It was decided to call a special meeting of the Privy Council for the purpose of examining Knox. If he failed to explain his conduct, and meet the charge of writing a letter for the purpose of treasonably assembling the lieges, he was to be tried by the Justice and a jury, when, by fair means or foul, a conviction would be obtained. Spens was directed to accuse him before the Council.

The affair at Holyrood had taken place in August, Knox's "Letter to the Professors" was written in October, and his examination before the Council was fixed for the middle of December. Before the day came the Earl of Murray and the Secretary Lethington had an interview with Knox at the Clerk Register's house. They endeavoured to entrap him into some confession, or to find out how he intended to defend himself. But Knox was on his guard, and they discovered nothing. Spens also saw Knox in private, but with another object. The Queen's Advocate came, "as it were in secret," says Knox, to seek an explanation, for he

¹ Knox's Works (Wodrow ed.), ii. 393; M'Crie, *Life of Knox*, i. 95, 96; Calderwood, *Hist.* (Wod. ed.), ii. 230; Spotiswoode, 188.

had not yet seen the letter written by the reformer. With Spens Knox was perfectly open. He read him a copy of the letter. The Queen's Advocate listened, and, having heard Knox's explanation, said, "I thank my God. I came to you with a fearful and sorrowful heart, fearing that you had done such a crime as the law might have punished, which would have been no small trouble to the hearts of such as have received the word of life which you have preached. But I depart greatly rejoiced, as well because I perceive your own comfort, even in the midst of your troubles, as that I clearly understand that you have committed no such crime as you are burdened with. You will be accused, but God will assist you." With these words the Advocate left.¹

When the day of the inquiry came, it was rumoured in the streets after dark that Knox had been sent for by the Queen, and a crowd gathered in the precincts of the Council Chamber. Within, the examination of Knox was chiefly conducted by Lethington and Mary herself. It appears that the Advocate's duty was merely formal. All we are told is that, "Efter the letter was red to the end, it was presentit agane to Mr. Johne Spens; for the Quene commandit him to accuse, as he efter did, but verie gentillie." The result of the examination is well known: "That nycht was nether dansing nor fyddilling in the Courte; for Madame wes disappoynit of hir purpois, quhilk wes to haif Johne Knox in hir will, be vote of hir Nobylattie."

While Spens was engaged in these weighty matters, Robert Crichton, his junior in office, was also employed on affairs of State. In July 1565 we find him appointed, along with John Hay, Master of Requests, to go to the Earls of Murray and Argyll, and demand an explanation of the report, which they were said to have circulated, that a plot had been

¹ Knox's Works (Wodrow ed.), ii. 401.

concocted against Murray, with her Majesty's approval, "in the back gallery of her Highness lodging."¹ In the following year he was despatched on a mission of a less dignified character, being sent to Aberdeen as Advocate, along with James Miller, "writer and depute to the Justice-Clerk," to take inquisition by all possible means as to a case of uttering false coin. He was not only sent to investigate the facts, but a commission to try the accused by a jury was given to him. The treasurer was instructed to pay "to the said Maister Robert and James their ordinary wages and charges, viz., to the said Maister Robert 40s. daily, and to the said James daily 20s., from the day of their departing to their returning, and the same shall be allowed to him on his accounts by the auditors thereof."²

Spens has been accused of having a share in the greatest crime of Mary's reign. Darnley was murdered at two A.M., on the 10th of February 1567. On the 12th proclamation was made that a large reward would be paid to any one who should discover the murderers. During the night of the 16th, under cover of darkness, a paper was fixed on the door of the Tolbooth in Edinburgh. It bore these words:—"I, in terms of the proclamation, have made inquisition for the slaughter of the King, and do find the Earl Bothwell, Mr. James Beafour, Parson of Flisk, Mr. David Chambers, and black Mr. John Spens, the principal devisers thereof, and if this be not true, spear at Gilbert Beafour." Three of the persons so denounced are well known. Of Bothwell it is unnecessary to speak. Balfour, "Parson of Flisk," was the crafty politician, who was then Clerk Register, and afterwards Lord President of the Court of Session. Chambers of Ormond had been for two years a judge, and was deep in

¹ Printed Register of the Privy Council, i. 340.

² *Ibid.* i. 468. The salary of the Advocate was usually £40 a year at this time.

the confidence of Balfour. It is said by the learned historian Tytler that "black Mr. John Spens" was John Spens of Condie, the Queen's Advocate; that the Advocate was one of those who "are to be found perpetually implicated in the conspiracies against their mistress the Queen," and whose names "have come down to us contaminated by crime;"¹ and that he was "publicly accused of being a contriver of the murder."² It is thus assumed that "black Mr. John Spens" was John Spens of Condie. Of this there is no evidence. The Advocate is always spoken of as John Spens "of Condie." Knox, in particular, who knew him well, seems always to have called him "of Condie." He describes him as "a man of gentill nature, and ane that professit the doctrine of the Evangell."³ But when writing on the subject of Darnley's murder, he affirms that "black John Spens" was one of "those that laid hands on the King to kill him."⁴ If black Spens and Spens of Condie were one and the same person, it is curious that in none of the letters, or other writings of the time, is there the slightest hint that the Queen's Advocate was implicated in the murder. It is probable that the "black John Spens," who is said to have borne a part in the murder of Darnley was some gentleman or attendant of the Court, well known in society at the time, and called "black Mr. John Spens" to distinguish him from the Advocate. There were many subordinate agents concerned in the crime: Signor Francis, Pagez, Joseph Riccio, Hepburn, Dalgleish, Hay, and Powrie. Besides these, there were men, like Captain Cullen, the friend of Bothwell, whose names were casually mentioned at the time, but of whose actual part in the tragedy little is known. Black John Spens was probably one of these.

Not only is there no proof that the Queen's Advocate

¹ Tytler, *Life of Craig*, p. 147.

³ *Works*, ii. 401.

² *Ibid.* p. 142.

⁴ *Ibid.* 551.

was, at the time, accused of complicity in the murder, but there is none that he was in league with those who contrived it, and who managed the acquittal of Bothwell. On the very day of the murder Bothwell's friends among the Privy Councillors wrote a letter to the Queen-Regent of France, explaining Darnley's death. The Justice-Clerk Bellenden signs this letter, along with Bothwell, Lethington, and the rest. The Queen's Advocate does not sign it.¹ At first it was not intended to try Bothwell. But Lennox forced the Court to have a judicial examination into the question of Bothwell's guilt or innocence. The case was then, in violation of the law, hurried on for the purpose of having the whole affair disposed of before there had been time for a full investigation. Spens cannot be blamed for this. The Justice-Clerk was the official whose duty it was to summon the accused. Nor had there yet been an Advocate of such eminence as to control, or even influence, the action of the Privy Council, much less had there been one so powerful as to thwart the desires of Mary, reckless at all times, and now inflamed with love for Bothwell.

Among "the chief persons who, under Murray, Bothwell, and Morton, managed the affairs of the State at this time," Mr. William Tytler, grandfather of the historian, names "Mr. John Spence, Lord Advocate," who, he says, was one of "the junto who managed Bothwell's trial."² Now the worst part of the management of this mock trial was what took place at the Council held on the 28th of March, when the arrangements for the trial were made. Bothwell himself was present. He was not put under arrest. He had a share in ordering the irregular proceedings which were devised for securing his acquittal. At this Council Spens was not present.³

¹ Letter, dated De Lislebourg, ce 10 de Feurier (1566-7).—Laing, *Dissertation*, App. No. v.

² W. Tytler, *Inquiry into the Evidence against Queen Mary*, ii. 96, 97.

³ Printed Register of the Privy Council, i. 504.

Yet, had he been in the plot, the Queen's Advocate, who was to represent the Crown at the trial, would most certainly have been there. When the trial came on, and the indictment was produced, it was found to be "framed with a flaw too manifest to be accidental."¹ The murder was said to have been committed on the 9th instead of the 10th of February. This was regarded as suspicious at the time.² "To whom," it is asked, "shall we impute this contrivance? To the officers of Court only, whose proper business it was to direct this matter: and who these officers were we have already shown, viz. Spence, Lord Advocate or Attorney for the Crown, and Sir John Bellenden, the Justice-Clerk, both of them creatures of Murray's, and soon after promoted to be members of his Secret Council."³ Now, it was no part of the Advocate's duty, at that time, to frame the indictment. That was the duty of the Justice-Clerk. Spens and Crichton attended at the trial. But their part, as her Majesty's Advocates, began and ended there. The plan of putting a flaw in the indictment was probably concocted at the meeting of Council on the 28th of March, at which Spens was not present; and the Council had a fitting tool, ready to give it effect, in the unscrupulous and brutal Bellenden. The error in the indictment was only to be used as a last resource, if, by any chance, Lennox ventured to bring forward witnesses, or the jury were not sufficiently complaisant. It was not needed. Lennox did not appear. The Commissioner whom he sent to represent him craved delay, which was refused. Spens and Crichton were instructed to remain silent. The jury, there being no evidence, were unanimous in acquitting the accused. They, however, handed in, along with the verdict, a protest in the following terms:—"That,

¹ Tytler, *Hist. Scot.* vii. 99.

² Robertson, *Hist. Scot.* i. 350; Hume, v. 114; Spottiswoode, 201.

³ W. Tytler, *Inquiry into the Evidence against Queen Mary*, ii. 102.

seeing neither her Majesty's Advocate had insisted in the pursuit, nor did Robert Cunningham, commissioner for the Earl of Lennox, bring any evidence of Bothwell's guiltiness, neither yet was the indictment sworn by any person, and that they had pronounced according to their knowledge, it should not be imputed to them as wilful error which they had delivered."¹

Two days after the acquittal of Bothwell the Estates met. The names of the Officers of State are to be found on the rolls of the Scottish Parliament from the year 1480; but it is on this occasion that they are, for the first time, called "Officiarii." Six great Officers of State are named, one of whom is the King's Advocate, the others being the Treasurer, Secretary, Privy Seal, Clerk Register, and Justice-Clerk.²

It is difficult to ascertain what part Spens and Crichton took during the political excitement of the next few years. Mary escaped from Lochleven Castle on the 2d of May 1568. Soon after her escape she revoked the renunciation of her Crown, into which she had been terrified by Lindsay; and at a meeting of her supporters, held at Linlithgow in April 1571, it was stated that she had done so "by advice of Mr. John Spens of Condie, her Advocate."³ This would seem

¹ Spotiswoode, 201. The following was the indictment against Bothwell:—"James Erle Bothwell, Lord Haillis and Creichtoun, etc., Ze ar indytit for arte and parte of the cruall, odious, tressonabill and abominabill Slauchter and Murther of the unquhile, the richt Excellent, right Heich, and michtie Prince, the Kingis Grace, derrest Spous for the Tyme to our Sourane Ladie the Quenis Majestie, under Silence of Nicht in his awin Ludgeing, besyde the Kirk of Field, within this Burgh, he being taking the Nichtis Rest, tressonabillie raising Fyre within the same with ane greit Quantitie of Pouder, throw force of the quhilk the said haill Ludgeing was raisit and blawin in the Air, and the said unquhile King was murtherit tressonabillie, and maist cruallie slane and destroyit be zow thairin, upon set Purpois, Provisioun and foirthocht Fellonie; and this ze did upon the Ninth day of Februar last bypast, under Silence of Nicht, as said is, as is notourlie Knawin, quhilk ze cannot denie."—Keith, 375.

² "Dñi electi ad articulos . . . una cum Officiariis, viz., Thesaurius, Secretarius, Custos Secreti Sigilli, Clericus Registri, Clericus Justicie, Aduocatus."—Act. Parl. Scot. ii. 546, 547.

³ Bannatyne, Memorials, 1569-1573 168; Brunton and Haig, 105.

to imply that Spens had separated from Murray, and was acting with the Queen's party. Yet in August 1568 he appears in Parliament as "Advocate to our Sovereign Lord."¹ At the Convention held at Perth, in July 1569, under the Regent Murray, he and Crichton were both present as the King's Advocates.² But at the Convention at Stirling, in September 1571, which met during the crisis caused by the death of Lennox, Spens alone was present; and, during the regency of Mar, we find him sitting in the Privy Council.³ He was in office till his death, which took place in 1573.⁴ Thus, during the successive regencies of Murray, Lennox, Mar, and Morton, Spens held the office of King's Advocate.

Crichton, on the other hand, during the regency of Lennox, was, it appears, suspected of leanings towards the Queen's party. Mary, when negotiations were in progress for her restoration, sent for him. Lennox, she was told, would not allow him to go, and compelled him to find security for £4000 Scots, that he would not leave Edinburgh.⁵ For this Lennox was taken to task by Elizabeth, when he declared that he knew nothing about it, as Crichton, whom he constantly saw, never told him he had been sent for.⁶

In 1573 John Spens died. According to Scotstarvet, he left three daughters. "One of them," he says, "was married to Herring of Lethinty, whose son, Sir David, sold all his lands of Lethinty, Gilmerton, and Glasclune, in his own time. Another was married to James Ballantyne of Spout, whose son James took the same course; the third to Sir

¹ Act. Parl. Scot. iii. 47.

² Printed Register of the Privy Council, ii. 3.

³ *Ibid.* ii. 100.

⁴ Brunton and Haig, 105.

⁵ Bannatyne, Memorials, Append. i.; Note of Allegations against Lennox.

⁶ *Ibid.* ii. The originals of the charges against Lennox, and his answers, are in the Advocates' Library, MSS. 29. 3. 12.

John Moncrieff, by whom he had an only son, who, after his marriage, went mad, and leapt into the river of Earn, and there perished; but left a son of good reputation, who had no land by his grandfather.”¹

By the death of Spens, a seat on the bench of the Court of Session became vacant. In the ordinary course of things it would have been given to Crichton; but, perhaps in consequence of his supposed leanings to the Queen’s party, the judgeship was conferred on David Borthwick of Lochhill, who was at the same time made joint Advocate with Crichton.

Borthwick’s history is uneventful. He was educated at St. Leonard’s College at St. Andrews, and came to the bar in 1549. He was at first on the side of the Reformation, but was afterwards spoken of by Knox as one of those by whom the Queen-Regent “corrupted the hearts of the simple.” He acted, for some time, as legal adviser to Bothwell, whom he defended at his trial for the murder of Darnley. Before and after his appointment as King’s Advocate, he took his part in public affairs.² He died in January 1581. A story is told of his last hours. As he lay on his deathbed, he was informed that his son, to whom he had already conveyed all his property, and who was rapidly wasting his means, had sold another estate. “What shall I say?” said the dying man; “I give him to the devil that gets a fool, and makes not a fool of him.” These were his last words, and the lawyers of his day called them “Mr. David Borthwick’s Testament.”

Crichton had been disappointed in his hope of succeeding Spens on the bench; but, in January 1580, he received a royal letter which declared that on the death of Borthwick

¹ Staggering State of the Scots Statesmen, 137.

² In 1553 he was a Commissioner to England on the state of the Borders.—Privy Council Register, i. 150. In 1574 he was on a commission for framing a Constitution for the Church.—Act. Parl. Scot. iii. 89, etc.

he would be made a judge, and also be sole Advocate. Borthwick was buried on the 31st of January 1581, and on the 1st of February Crichton took his seat as a Senator of the College of Justice.¹

In November of this year an Act was passed for the purpose of regulating the business of the Privy Council. In two recent sessions this subject had engaged the attention of Parliament.² The rules which were now framed were of a complete and somewhat interesting character. The Great Chamberlain, Lord Chancellor, Treasurer, Secretary, Comptroller, Collector-General, Justice-Clerk, Clerk Register, King's Advocate, and Master of Requests, were to be on the Council, along with twenty-one other members. No one was to be present at a meeting of Council except the sitting Councillors, and one clerk to the Council. The Master of Requests occupied a peculiar position. He was to stand outside the door, unless when called in to explain the petitions presented to the Council. None of the Councillors were permitted, from the time they entered the Council-room till the sitting ended, to leave and speak to any one outside, or to rise from the table and move about the room, "neglecting the effairis that ar intreatit amangis the remanent that sittis." Any young noblemen who entered with the King might remain and hear the discussions, if his Majesty permitted them; but they were sworn to secrecy. Finally, the King was to have the right of nominating, at any time, three additional members of Council.³

Crichton's life was now drawing to a close. In June 1582 he was in feeble health, and unable to perform the duties of his office. On the 14th of that month, David Macgill, a leading member of the bar, produced, in the

¹ Brunton and Haig, 155, 177.

² In 1578, Act. Parl. Scot. iii. 96; and 1579, Act. Parl. Scot. iii. 150.

³ Act Parl. Scot. iii. 228, 229.

Justice Court, a letter, under the King's hand, desiring him "to supply the sickness of Mr. Robert Crichton, Advocate."¹ Crichton died before the end of the month, and Macgill became King's Advocate, and a judge of the Court of Session.

Some interest attaches to the family history of Crichton. The romantic life and tragic fate of James, his first-born, are well known.² The career of Robert, his second son, gives us a curious picture of the lawless habits of the Scottish gentry at that time. The King's Advocate had been thrice married. His first wife was Elizabeth Stewart, daughter of Sir James Stewart of Beath, by whom he had four children—James, Robert, Marion, and Grizel. After her death he married Agnes, daughter of John Moubray of Barnbougall. She bore him one daughter, Agnes. Late in life he married his third wife, Isobel Borthwick, who, it is supposed, was the daughter of his late colleague in the office of King's Advocate. She had two daughters—Helen and Elspeth. Isobel Borthwick was a good wife to the old man, when his health began to fail. In his will, by which he made her his sole executrix, he says, "Scho has bene to me ane honest lowing wyf, chest in hir persoune, and ane that feiris God." This testament is very different from that of David Borthwick. "As to my guidis and geir," he says, "I am not very rich thairin ;" but he dies at peace with all men. "I hoip to see the gudness of the Lord in the land of the leiving : Prayes to the Lord evermair, sobeit, evermair, sobeit, even sobeit."³

¹ Pitcairn, *Crim. Trials*, i. ii. 101. Two days after this Macgill's name appears on the record: "Persewar, Mr. David M'Gill, as Aduocate to our souerane lord."

² The "Admirable Crichton," elder son of the King's Advocate, was never in Scotland after his father's death. According to some authorities, he died in July 1582; according to others, he lived till November 1584. The evidence on the subject is collected in Tytler's *Life of the Admirable Crichton*, 155-159.

³ Tytler, *Life of the Admirable Crichton*, 4-6. The whole of the Advocate's will is printed in the Appendix to the *Life of Crichton*, 276-279.

His son Robert succeeded to the lands of Eliok, "a fair estate," according to Scotstarvet. The career of Robert Crichton is a startling proof of the weakness of the criminal law, the disregard in which it was held, and the savage manners of men holding a good position in society. After the death of old Robert Crichton, the Advocate, Isobel Borthwick married James Stirling of Feodallis, and sent her step-daughter, Marion Crichton, to be educated in the house of Henry Stirling of Ardoch, a brother of her second husband. While the girl was living there, her brother, Robert Crichton, perpetrated a brutal outrage on her and her hosts. In company with Patrick Græme of Inchbrakie, and a band of armed men, he arrived, one summer night, at Ardoch. On the pretext of public business, they gained admittance. They then dragged Mrs. Stirling, who was pregnant at the time, up and down in the most violent manner; they emptied the house of a number of valuable articles; and, seizing Marion Crichton, carried her away by force. For this lawless deed they were called to account, and summoned to produce Marion before the King in Council, as she was "at ye tyme of the reavesing and awaytaking of hir from Harie Stirling of Ardoch." They did not appear, and were declared outlaws, a sentence at which they probably laughed.¹

Not long after this Crichton was guilty of another crime. From motives of private revenge he murdered a country gentleman. Again he was summoned to appear, this time on a charge of murder. He did not appear, and no further proceedings were taken against him. Soon, however, he went beyond all bounds. In these times of cruelty and outrage, even the Presence-Chamber itself was disgraced by brawls and violence. Crichton, who seems to have been received at Court, was at St. Andrews on one occasion when the King was there. He attacked one of the royal suite,

¹ Tytler, *Life of the Admirable Crichton*, 167-169, 229.

and fled from justice. For this he was outlawed, and seems to have disappeared from notice.¹ Crichton of Eliok was, it may be, worse than his neighbours; but his deeds were shared by men of honourable descent and high standing in society. "Nothing," says Tytler, speaking of the Raid of Ardoch, "can furnish us with a more convincing proof of the lawless manners of this age, than the circumstance, that the leaders in this cruel assault were gentlemen of family and property in this part of the country."

¹ Tytler, *Life of the Admirable Crichton*, 171. Assaults committed within the precincts of a royal palace were viewed with peculiar resentment. An instance of this occurred in March 1574, when the Regent informed the Estates that, in spite of a proclamation made for preserving order, John Campbell of Shaw and his servants had been attacked, "under silence of night, as they passed forth from the Palace of Holyroodhouse to their beds," by the Master of Ochiltree and some accomplices. The Estates decided that the offence must be punished severely, "and willit our Soverane Lordis Advocat, being present, to call the said Maister of Ochiltre and his complices to underly the law therefoir, and to insist in the persute that the said offence may be punneist as the same justlie deserves."—Act. Parl. Scot. iii. 90.

CHAPTER III.

THE PUBLIC PROSECUTOR.

THE doings of the laird of Eliok show that the criminal system was wholly defective. The law must have been powerless when such crimes could be committed with impunity. The outrages which have just been described were perpetrated by men of rank, whose position and resources enabled them to set justice at defiance. The lower classes were, however, equally violent. In their own humble sphere they followed the example of the aristocracy, and were almost equally exempt from the control of law. But it was at this time that the office of the Public Prosecutor was established in Scotland. Many years were, indeed, to elapse before this event brought about any great or beneficial results ; but the reforms which are now to be described were wise and comprehensive, and laid the foundations on which our present rules of criminal procedure rest.

In June 1582 David Macgill was appointed King's Advocate in place of Crichton. He was the son of Sir James Macgill, Provost of Edinburgh. The Provost had two sons. The elder was that Sir James Macgill of Rankeillor who had so large a share in the murder of Rizzio, who, having been dismissed from the office of Clerk Register by the Queen, was restored to it by the favour of Murray, who was a leader among the party which imprisoned Mary at Lochleven, and who was one of those who prosecuted her at

York. The younger son was David Macgill of Nisbet and Cranstonriddel in Midlothian, who became Advocate in the circumstances described in the last chapter.¹ On his appointment as King's Advocate he was raised to the bench.

The Register of the Privy Council shows that the new Advocate was diligent in his attendance. He had joined the Government at a time when its hands were full. Lennox, now in power, was using all his influence against the Church. Shortly before Macgill took office the Archbishopric of Glasgow was offered to a minister of the Church named Montgomery. He accepted it, but was arraigned before the General Assembly, and forbidden to act as a prelate. This command Montgomery did not obey. At the head of a band of armed men he marched into the Cathedral of Glasgow during service, and attempted to drag the minister out by force. But the populace rose against him, and he was forced to leave the city.

The Lords of the Privy Council now forbade the Church to proceed against Montgomery. He was, nevertheless, once more summoned to the bar of the Assembly, and, in spite of a direct command from the King, would have been excommunicated, had he not submitted, and solemnly declared that he would not take the bishopric. The Church Courts had thus successfully defied the King and the Privy Council. But Montgomery broke his word and took the bishopric. For this he was at once excommunicated.

The General Assembly met on the 27th of June 1582, the very day on which Macgill was appointed King's Advocate; and before long the censures of the Church were specially directed against him. It is, indeed, possible that he owed his appointment to the fact that he alone would act

¹ *Supra*, pp. 38, 39. Douglas' Peerage, ii. 345. His Commission as King's Advocate bore that he was to receive £40 Scots of feal and duty, payable at two terms in the year.—Hailes' Catalogue, Note xxxiii.

as counsel for Montgomery, at a time when all the younger advocates refused to do so.¹ He now, at all events, identified himself with the policy of Lennox and Arran, and was on terms of personal friendship with Lennox. On this account he was afterwards named among those who sought to bring about "the wracke of the King's soule, body, honour, crown, and estate."²

Soon after Macgill took office the Privy Council met at Perth in order to receive a Committee of the General Assembly, appointed to lay before the King Articles of Complaint against the way in which the Council had invaded the province of the Church Courts in the case of Montgomery. The scene was memorable. Two words, uttered by Andrew Melville, the spokesman of the Church, sealed the fate of the Lennox-Arran administration. "Who dare subscribe these treasonable Articles?" asked Arran. "We dare," replied Melville, who, along with the other ministers, signed the Articles, left the Council Chamber, and proceeded to censure those who had supported the Government.

The King's Advocate was summoned before the General Assembly, as the author of a "slandorous proclamation set out against the ministry," and for "opposing the lawful proceedings of the Kirk." A threat was held out that if he did not attend he would be excommunicated. After some delay he appeared, and, making excuses for not coming sooner, craved time to consider the charge against him. Time was allowed him. On the following day he again appeared, and begged the Assembly to consider that he was his Majesty's Advocate, an officer who only shared with others the responsibility of any Act or proclamation of the Privy Council. He said that if they had any charge against him, he was ready to answer it. The Assembly then called on him to explain his connection with the proclamation, on which he

¹ Calderwood (Wod. ed.), iii. 620.

² *Ibid.* iv. 408.

“solemnly declared that he neither invented, penned, nor formed the proclamation: but, at the desire of the Duke, translated out of French the last part thereof.” This explanation satisfied the clergy, who took no further proceedings against him.

The bold attitude of Melville and the Churchmen had shaken the Government. In August 1582 the Raid of Ruthven took place, and the Lennox-Arran administration came to an end. Arran was imprisoned, and Lennox left Scotland.

Macgill continued in office as King’s Advocate. The Ruthven Raid administration was at an end in July 1583; and he acted as prosecutor when, almost exactly two years after the Raid, its authors were tried on a charge of treason.¹

In 1587 the King came of age. Parliament met in July. The time was more favourable for domestic legislation than it had been for a quarter of a century. The restless spirits of Mary’s reign and the regencies were quiet now. Maitland of Lethington, the ablest of them all, had poisoned himself. Morton had been beheaded. Murray had been murdered. Bothwell had died in exile. The only thing to disturb the young King, on the eve of his majority, was the recent death of that ill-fated Queen, round whose throne those fiery souls had schemed and fought. But her death brought quiet and rest to the country. The session was a busy one. The Church, the privileges and the forms of Parliament, matters of commerce, the best means of preserving the public peace, the administration of justice, all formed the subject of legislation. The new enactments were of a sweeping character. The temporalities of all benefices were annexed to the Crown; the suppression of Popish literature was provided for; severe penalties were prescribed against persons who raised tumults and riots in churches; by one Act the right

¹ 20th Aug. 1584. Pitcairn, *Crim. Trials*, i. ii. 119.

of free speech was declared to be the privilege of members of Parliament; by another Act strict rules were enacted for the behaviour of members; the jurisdiction of the inferior judges was defined; rules were framed for the examination of those who wished to practise as notaries; regulations of great severity as to the Highlands and Borders were laid down; Parliamentary elections were regulated;¹ an Act was passed dealing with the important question of weights and measures.² Several Statutes dealt with the administration of the criminal law; and among them was the Act in virtue of which the King's Advocate became public prosecutor.

The change from that rude custom by which the punishment of a crime was demanded by the sufferer or his relatives to the system of a public prosecutor, pursuing for the public interest, could not be brought about suddenly. Under the primitive rule of private revenge a custom had grown up, by which, in many cases, the offender was able to escape by paying a sum of money to his accuser. The practice of receiving money compositions accustomed people to regard their injuries more calmly, and substituted, to some extent, the passion of greed for the passion of revenge. This led to the establishment of a regular system of compensation, even for the most serious crimes. The wife did not exact the penalty of death for the murder of her husband, if a sufficient sum of money was paid to her by the murderer. In return for such a payment the murderer received a Letter of Slaines, a document which bore that it was granted to him in consideration of his inward repentance and the money

¹ The county franchise had been hitherto regulated by the Stat. 1427, cap. 101, which gave every freeholder a vote. The Act 1587, cap. 114, provided that none should vote "*bot sik as hes fourtie shilling land in free tenendry halden of the King, and hes their actual dwelling and residence within the same schire.*"

² The King's Advocate was on a Commission on Weights and Measures, the terms of which seem to imply that there could be no meeting of the Commissioners unless he was present; and the place of meeting was fixed at "*his lodging within the burgh of Edinburgh.*"—Act. Parl. Scot. iii. 521.

which he had paid. The widow freely forgave him, and abandoned all "malice, rancour, grudge, hatred, envy of heart, and all occasions of actions, civil and criminal," and agreed to receive him "in such amity, friendship, and hearty kindness," as if the crime had never been committed.¹

Payments of money in satisfaction of injuries were common in many countries besides Scotland at a time when the right of prosecution was left entirely in the hands of private persons. Laws had even been made by which the delinquent was compelled to pay, and the person injured to receive, a composition in money. But a private prosecutor was not under the same restraint as a public officer. He might give up his right to pursue or to exact a fine; or he might take the fine, and then exact personal vengeance in addition. In France it was found necessary, at one time, to make the accuser swear, after receiving a money payment, that he would not prosecute his feud further.² In Scotland, where the ties of blood are never forgotten, a prosecutor had been known, when several persons were at the bar, to refuse to proceed against one of them who was his kinsman, but to insist on his right of prosecuting the rest.³

In consequence of the private arrangements which were made, many criminals were not prosecuted, dangerous persons were allowed to remain at large, and money which should have come into the royal treasury, in the shape of forfeitures and fines, was lost. These forfeitures and fines formed a substantial portion of the revenue, a fact which had much to do with the passing of the Act which empowered the Advocate to prosecute independently of the private party. The King was poor. The revenue produced from the estates of convicted felons was not so great as it should have been; for the system of money compositions privately paid saved

¹ Kames, Law Tracts, Append. No. i.

² *Ibid.* 32.

³ Pitcairn, Crim. Trials, i. ii. 34 (19th July 1572).

many persons from being tried. In cases where the injured party did bring the accused to trial, a compromise was sometimes arranged before a verdict was returned. The King had, indeed, power to charge his Advocate, by special warrant, to insist in the prosecution. But, as a rule, if the private party did not go on, the case was never tried; and it was to secure the escheat that the King's Advocate was now made public prosecutor.

The attention of Government had for some time been directed to this subject. At a meeting of the Privy Council, held at Stirling Castle, in 1579, the state of the Criminal Courts was considered, and the Advocate and Treasurer were directed to prosecute certain offenders, although the private parties declined to do so.¹ In the same years the Estates passed an Act, the terms of which seem to imply that the King's Advocate had the power of prosecuting otherwise than by concurring with the private party. The object of this Statute was twofold: first to prevent the time of the Courts being taken up with unnecessary and malicious prosecutions; and, secondly, to bring money into the royal exchequer, "if the King's Majesty's Advocate be only pursuer," by making the informer, in the event of an acquittal, pay a sum of money which was to be divided between the Crown and the accused.² The crimes, in which the King's Advocate was "only pursuer," were those of a public nature, offences against the Crown or the State, for which no private person had, in Scotland, the right to prosecute. That the Advocate had not, at this time, the right of prosecuting for all crimes, whether the injured party wished or not, is proved by two cases of a quasi-criminal nature, which were decided a few years after the Act of 1579 passed. In one of these cases the King's Advocate wished to intervene for the purpose of pressing a charge of forgery. The

¹ Privy Council Minute, 28th May 1579.

² Stat. 1579, cap. 78.

case had been settled between the parties, and it was pleaded that, without the concurrence of the injured party, the Advocate could not appear. To this it was answered that forgery was an offence against the State.¹ "Therefore albeit the parties would make collusion among themselves by invention and forging of falsets, yet the King's Advocate ought to be heard aye to improve." The Court, however, decided against the right of the Advocate to appear. In the other case the decision was to the same effect. It was argued for the Crown that the King's and the Advocate's interest was separated from that of the other party, because it was the duty of the State to see that crime did not go unpunished: "So the Advocate might both inform and pursue at his own instance, without the advice and information of a third party." The Court again decided against the Advocate.²

But now, in 1587, an Act was passed which clearly established the right of the Crown to prosecute in spite of the wishes of any private person. This Statute ran thus: "That the Thesaurer and Advocate persew slaughters and utheris crimes, althoucht the parties be silent or wald utherwayes privily agree."³ After the passing of this Act we find a series of decisions in which the right of the King's Advocate to prosecute apart from the private prosecutor is recognised.⁴ The question was raised from time to time. Once, at a trial for rape, the prisoner's counsel pleaded that the case should not go to trial, as the "special party pursuer" was not present to pursue. The answer made by the Advocate was not that he prosecuted alone, but that the

¹ "*Crimen falsi fuit actio popularis et de publicis judiciis et interest reipublicæ ne hujus modi crimina maneant impunita.*"—*Advocate v. Chapman*, June 1583.—*Mor. Dict. Dec.* 7896.

² *Advocate v. Forrest*, March 1584.—*Mor. Dict. Dec.* 7896.

³ *Stat.* 1587, cap. 77.

⁴ *Chalmers v. Dick*.—*Mor. Dict. Dec.* 7897, etc. Lord Medwyn's opinion in *H. M. Advocate v. Dunglas*, *Shaw's Court of Session Reports*, xv. 327.

mother of the injured woman was ready to pursue, and that she or any of her kinsfolk might do so with his concurrence. The Court repelled the prisoner's plea. On another occasion, at a trial for wife-murder, the accused maintained that he should not be tried unless there was a party informer to assist the Advocate, and that, as none of the murdered woman's kinsfolk appeared, the charge should be dismissed. In this case the Advocate answered that he had the right of prosecuting without an informer, and the Court decided that the trial should proceed.¹ The right of the private prosecutor was not affected by the Act, and, indeed, for a long time, private prosecutions were the rule. But the object of the Statute was to stop the abuse of private agreements between the parties. It gave the King's Advocate, for the first time, the privilege of pursuing, on his own behalf, in every species of criminal case, instead of being restricted to a limited class. It made him, in fact, public prosecutor.

With the Advocate the Treasurer was conjoined. His interest was the escheat. In some cases the forfeited estate was kept by the Crown; in others it was given to some royal favourite. Often a promise of the escheat was made before the trial, and the person to whom it had been promised appeared, along with the Advocate, as a prosecutor in the case. There are no cases of a prosecution at the instance of the Treasurer alone.² But, both before and after 1587, the Treasurer appeared for the Crown, along with the Advocate, in both civil and criminal cases.³

For a long time after the passing of the Act of 1587, special mandates or warrants were, on many occasions,

¹ Pitcairn, *Crim. Trials*, iii. 439, 481.

² Hume, *Com.* ii. 131. See the trial of William Barclay, 24th April 1601. Pitcairn, *Crim. Trials*, ii. 348.

³ Pitcairn, *Crim. Trials*, i. ii. 86; *Mor. Dict.* Dec. 7327; *Stat.* 1592, cap. 70; *Act. Parl. Scot.* iii. 576.

granted by the Privy Council to the Advocate, authorising or directing him to prosecute in certain cases. The reason of this is to be found in the lawless state of the country. Not only were the nobles turbulent, but the peasants of Scotland were as vindictive as the mountaineers of Corsica, and the position of the public prosecutor would often have been one of extreme danger, had he not been able to show clearly that he was acting under the directions of the Privy Council.

There is reason to believe that the system of having regular Depute-Advocates commenced at this time, probably in consequence of the additional number of criminal trials which took place. A civil action can be tried in the absence of the parties; a criminal case cannot. Both the accuser and the accused must be present. This rule, however, could not be applied to the public prosecutor. "I need hardly observe," says Hume, "with respect to the Lord Advocate, that he necessarily enjoys the peculiar privilege of appearing by his deputies, who, having his powers communicated to them, are accounted in law the same person as himself." We have already seen that special appointments were made of Depute-Advocates. Kincraig was appointed by the Estates of Parliament in 1544. Macgill was appointed, by special warrant, to supply the place of Crichton in 1582. These were leading counsel; but we now find men of inferior standing at the bar appointed. Macgill's son acted constantly as substitute for his father. There was no fixed number of Deputes at first. But as time went on three was found to be a convenient number. In the present century the number was fixed at four.

The Statute which made the King's Advocate public prosecutor was accompanied by a number of reforms in the arrangements of the Criminal Courts. The old custom, "the ancient and loveable order," as it is styled in an Act of 1587,

had been to hold Circuit Courts twice a year in each county. But this custom had fallen into disuse. The Criminal Courts of the King were now usually held in Edinburgh alone. They met for special sittings, to try crimes of a heinous nature. This was a cause of much trouble to the lieges, who had to travel to Edinburgh at great cost. In Edinburgh the Courts were often adjourned, and parties were put to much inconvenience. A change was now made. It was enacted that a Circuit Court should be held in each county twice a year, in April and October. To provide the necessary judges, the Justice-General was empowered to appoint eight Justice's Deputes; or the Crown might appoint certain of the judges of the Court of Session, or counsel of good standing at the bar, to sit as justices on Circuit. A Treasurer-Depute and a Justice-Clerk-Depute attended each Circuit. The Sheriff or his Depute, along with the gentry of the neighbourhood, received the judges when they entered the shire. The judges were then escorted to the head burgh of the shire by the Sheriffs and gentry, who attended them while they remained. On the morning after the arrival of the judges, the trials began.¹ First, those in prison were tried; then, those out on bail; and lastly, "persons newly indicted and arrested." The business of the Circuit being ended, the judges handed an extract of the sentences which they had pronounced to the Treasurer-Depute, who levied the fines, and accounted for them to the Treasury.²

But, previous to the arrival of the judges, it was necessary that steps should be taken for making up a roll of persons who were to be tried, and preparing the necessary indictments. On this point a complete innovation was introduced. According to the old plan, it was the duty of the Justice's Clerk, or his Depute, acting in communication

¹ At 11 A.M.—Stat. 1587, cap. 87.

² Stat. 1587, cap. 82.

with the Sheriffs, to find out what crimes had been committed, and what persons should be brought to trial. With a view to this, the Justice-General wrote to the Sheriff, informing him that, on a certain day, his Clerk would arrive at the county town, and directing him to summon some of the leading citizens for the purpose of preparing the necessary information. The Justice's Clerk considered the information laid before him, decided for what offences the accused should be indicted, and made up a roll of offenders, which was known as the Portuous Roll. The next step was to have the accused arrested, or bound over in bail. This duty fell on the Coroners. The Justice's Clerk handed a copy of the Portuous Roll to the Coroner of the county, along with the "Traistis,"—a roll of the indictments against the persons named in the Portuous Roll. The Coroner then served the indictments on the accused, and arrested them, or took security that they would appear for trial.¹

This system was now changed. The new plan was that in each county Justices of the Peace, who were to be nobles or landed gentlemen, were appointed as "constant and continual uptakers of dittay." They were to perform the duties hitherto vested in the Sheriff and Justice's Clerk. The means which they were to take for making up the roll of criminals were left, to a large extent, to their own discretion. They might take sworn informations, or use their own private knowledge. Having made up the roll, they were to hand it to the Coroner, whose duty it was to arrest the accused, or take security for their appearance. The graver offences were to be tried before the Justice's Deputes on Circuit. The lighter cases were to be taken by the Justices of the Peace at Quarter-Sessions. It was doubtless supposed that the detection of crime would be more complete if left to persons who were always on the

¹ Hume, Com. ii. 23, 24.

spot. But such a system contained the germs of failure. Local influences would prevail in some cases. The Justices of the Peace were not paid, and, therefore, at a time when the prevalent ideas of public duty were lax, would take but little trouble. The habits of the age were violent; and, therefore, fear would prevent some acting on what they knew. Above all, the jurisdiction of the King's Courts was regarded with jealousy by the owners of the many heritable jurisdictions. Accordingly it is not surprising to find that, in a short time, the new rules, though not formally repealed, were abandoned, and the previous custom revived.¹

By a number of enactments the liberty of the subject was guarded. All adjournments of Justice Courts from day to day were forbidden, so as to remove an abuse which had enabled any one who could gain the ear of the Privy Council to obtain a warrant to the Justice directing him to delay proceedings.² This Statute was, however, ignored for many years to come, whenever it suited the Privy Council or the King's Advocate.

It was also enacted that all persons accused of any crime might be defended by counsel; and it was the duty of the judge to compel an advocate, once retained, to plead for his client.³ But this statutory benefit of counsel was, to a great extent, neutralised by the restrictions which the common law imposed on the defence. When the King's Advocate charged a prisoner with a crime, the prisoner could, certainly, plead not guilty. But a defence which expressly contradicted the facts set forth in the indictment was not allowed. How far this principle was carried it is difficult to discover; nor was the law upon the subject ever settled by any decision of the Courts. But Sir George Mac-

¹ Hume, Com. ii. 24, 25.

² Stat. 1587, cap. 80.

³ Stat. 1587, cap. 38, 91.

kenzie, writing towards the end of the seventeenth century, doubted whether an *alibi* was admissible by the law of Scotland.¹

Three Statutes relating to juries were passed. Forty-five persons, named in a roll signed by the prosecutor, were to be summoned, and the officers of Court were forbidden, under severe penalties, to tamper with the roll of jurors. No challenge was allowed. A special objection, that the juror was insane, or that he was a minor, or that he was a pauper, could be stated. But no peremptory challenge was allowed in Scotland till the nineteenth century. Jurors who did not appear were fined, a measure which was rendered necessary by the fact that cases had been known in which so few of the jurors summoned had appeared, that a jury could only be obtained by sending out into the streets, or choosing some of the spectators in Court.

Great injustice had been done by persons going to the jury after they were enclosed. Entreaties and promises, sometimes even menaces, were employed by the prosecutors and their friends. The prosecutors used to go to the jury, show them documents, and question witnesses, in the absence of the accused. To remedy this abuse, an Act was now passed providing that the prosecutor should produce all his evidence in the presence of the accused and the presiding judge.² The spirit of this Statute, which was intended to secure that all evidence should be led before the jury in presence of the accused, was infringed by the King's Advocates for many years subsequent to 1587. Previous to a criminal trial, the Advocate, or his Deputes, examined the witnesses before the judge who was to preside at the trial. When the day of trial came, the indictment was laid before the jurors. No witnesses were examined by word of mouth. The statements previously made were read aloud, and all the jury

¹ Criminal Law, ii. xxii. 3.

² Stat. 1587, cap. 91.

had to do was to compare these statements with the facts set forth in the indictment. So late as 1683 the King desired the criminal judges to examine witnesses on oath, in cases of treason, in order that "His Majesty's Advocate might know how to libel." But this was resisted as contrary to the Act of 1587, ordaining proof to be received only in presence of the accused.¹

By the custom of the time, the counsel for the defence addressed the jury after the evidence had been led, and was followed by the prosecutor, who had the privilege of speaking last. The jury were then enclosed to consider their verdict. In order to enforce the new law, which ordained that the jury were to hear evidence only in presence of the accused, an Act was passed which provided that if any of the jurors had questions to ask, they were to ask them openly, in presence of the accused, before retiring. The foreman was chosen before they left the Court-room. The door of the jury-room was locked, and no one was permitted to visit the jury.² No juror was allowed to come out. They had to remain enclosed till their verdict was given, either unanimously, or by a majority. Great stress was laid on the necessity for keeping the jury apart. It was provided that "if any of the said accusers, informers of his Highness' Advocate, or other persons whatsoever, pretend in any way, in time coming, to inform, solicit, reason, dispute, speak, or repair to the said assise," the accused was at once entitled to an acquittal. No verdict was good unless the jury were enclosed and the verdict returned in writing. This continued to be the practice until the year 1814, when a Statute was passed which allowed the jury, if unanimous, to return their verdict by word of mouth, after consultation in the jury-box. By the present law a verdict

¹ Hume, Com. ii. 83; Mackenzie, Observations, 253.

² Stat. 1587, cap. 92.

can be returned by a jury, whether unanimously or not, by word of mouth, and without being enclosed.¹

The provisions of the Jury Acts of 1587 were framed for the purpose of guarding the accused, and protecting the jury from interference in the discharge of their duty. But, like most of the enactments of 1587, they were often infringed. They were viewed with suspicion at the time they passed.² The rights of the jurymen were frequently and shamelessly invaded by the judges and the King's Advocates. Nor were the jurors interfered with only in violation of the law. The law itself put a powerful weapon in the hands of the King's Advocate. Just before the jury retired, the prosecutor might "protest for wilful error." The meaning of this phrase was that he entered on the books of Court a warning, that if the accused was acquitted, the jury would be tried and punished. When such a trial, for "wilful error," took place, the offending jurors were arraigned before a Great Assize, which consisted of twenty-five persons, who must be of a rank not lower than landed gentlemen. This jury of twenty-five, called an Assize of Error, heard the evidence on which the common jury had acquitted the accused, and if they thought the verdict clearly wrong, they found the common jury guilty of wilful error. The jury, thus convicted by an Assize of Error, were liable to a year's imprisonment and the loss of all their personal property. But the person whom they had wrongfully acquitted received the benefit of that acquittal, and was not tried again.³

In addition to these Acts, the Parliament of 1587 passed other Criminal Statutes of considerable importance. One of these Statutes was aimed at those who made reckless accusations of treason against innocent persons. This had become

¹ 54 Geo. III. cap. 67 ; 6 Geo. IV. cap. 22 ; 9 Geo. IV. cap. 29.

² Hume, Com. ii. 419 ; Act. Parl. Scot. iii. 461.

³ Stat. 1475, cap. 63 ; Skene, De Verb. Sign. *voce* Assisa ; Mackenzie, Criminal Law, ii. xxiii. 12.

a common weapon in the party warfare of the day. Each faction or sect hurled charges of treason against its rival. The feuds of private families led to mutual accusations of disloyalty, and men gratified their personal spite by going to the King's Advocate, and procuring a process of treason. The Act which was now passed declared that whoever accused another of treason was, if the charge was not proved, to be himself punished as a traitor.¹ The persons aimed at were malicious accusers, and the penalty of treason was not inflicted on those who could show that they had acted on reasonable grounds. Nor did the Act apply to the King's Advocate. He was shielded by the privilege of his office, or protected by a special warrant from the Crown.²

This Act was aimed at the system of malicious accusations. Another Act was passed to enable the Advocate to punish, with very severe penalties, the nobility and gentry for their acts of spoliation. It declared that any "landed man" convicted of theft was to incur the pains of treason—that is, the loss of life, lands, and goods.³ Although "theft in landed men" was punishable as treason till the Union, yet as time went on, and crimes of that nature became less common, the King's Advocate usually restricted the pains of law, and did not press for the extreme penalty.

Another Statute was passed to give the public prosecutor additional means of reaching persons who were guilty of the treachery of murdering those under their protection. This crime, known as Murder under Trust, was accounted treason.⁴ It embraced the murder of a wife by her husband, and of a servant by his master.⁵

The Act which made the King's Advocate public prosecutor gave him the right of pursuing without an informer. Yet,

¹ Stat. 1587, cap. 49.

² Mackenzie, *Observations on the Statutes*, 243.

³ Stat. 1587, cap. 50.

⁴ Stat. 1587, cap. 51.

⁵ Mackenzie, *Observations on the Statutes*, 243.

in the great majority of cases, he acted on the motion of an informer. It had for some time been the law that, in those cases where the Advocate prosecuted alone, his informer was liable in a penalty, if a conviction was not obtained.¹ Where no private prosecutor appeared, the name of the Advocate's informer was often marked on the record. But in many cases it was concealed. An Act of 1587 recognised the claim to expenses of a person accused and acquitted.² No claim for costs could be successfully maintained against the King's Advocate, in his capacity of public prosecutor, and the question was, therefore, raised whether he was bound to disclose his informer. The Court decided that he was not.³ This point was, nevertheless, frequently and fiercely disputed. In one case, long after the King's Advocate was public prosecutor, it was pleaded that, though he was presumed to act without personal motive, "yet gentlemen's lives, estates, fortunes, and reputations, ought not to be brought in question without he condescend on his informer." The Advocate replied that he had no informer, but the Privy Council having employed one to name suspected persons, he was prosecuting them in virtue of a warrant from the Council. The Court held that the fact of his prosecuting in virtue of such a warrant relieved him of any obligation to reveal his informer.⁴

Every crime affects two interests, that of the community and that of the private citizen. The interest of the community is to punish in order to prevent the commission of similar crimes in the future. The interest of the private citizen is to obtain reparation, and avenge the wrong done to himself. The principle of the Act of 1587 was that malefactors ought to be punished in the interests of the

¹ Stat. 1579, cap. 78.

² Stat. 1587, cap. 88.

³ Trial of James Connell, 20th April 1599.

⁴ Fountainhall, Decisions, i. 136.

community, and that principle is the foundation on which rests the structure of the public prosecutor's office. The civil claim for damages remained; but the criminal pursuit was gradually removed from the hands of the private prosecutor, and we shall see how, not suddenly, but by slow degrees, the King's Advocate absorbed, as time went on, the complete control of all criminal prosecutions. The existence of a public prosecutor has a powerful influence on the view taken of the enormity of certain crimes. An offence which may seem intolerable to the party injured, may be of no moment to the public. On the other hand, the private party may be ready to pardon what the public prosecutor insists on punishing. Thus it is that those crimes which endanger the public peace, which are productive of discomfort to large classes of the people, or which create a feeling of commercial distrust, assume greater importance as the State takes into its own hands the control of criminal prosecutions; and certain acts come to be regarded as criminal only because they tend to endanger the safety or comfort of the people.

In 1589 Macgill received a colleague in the office of King's Advocate. This was Sir John Skene of Curriehill. Skene is the first of the King's Advocates who was famous as a lawyer. His predecessors were statesmen and men of affairs, diplomatists and courtiers, rather than jurists. Skene's name is associated with those early attempts at a codification of the law, which are among the chief features of our legal history during the reign of James the Sixth. He held the office of King's Advocate for little more than four years, and was better known to his contemporaries as a learned jurist than as a politician.

Skene was born about the year 1549.¹ After finishing his University career at Aberdeen and St. Andrews, he is said

¹ Brunton and Haig, 230. "The second son of James Skene of Westercross and Ramore, and Janet Burnet, second daughter of Alexander Burnet of Leys."

to have travelled for some time in Norway and Denmark. He completed his education by a course of legal study in France, and was called to the bar of Scotland in 1574. Henceforth his life becomes the history of a series of Commissions which were appointed for the purpose of reducing to order the various authorities on the law of Scotland. In 1567 a Commission had been appointed to digest the law, dividing it into heads after the manner of the Roman Law.¹ This Commission came to nothing. In 1574, during the regency of Morton, another Commission had been appointed, to meet at Edinburgh, to revise the books of law, the Acts of Parliament, and decisions of the Court, for the purpose of preparing a Code.² In 1578 a third Commission was appointed to revise the laws. Among the Commissioners were Crichton, at that time King's Advocate, and two members of the bar, Alexander Skene, a brother of John Skene, and Thomas Craig, the famous feudal lawyer.

Skene was engaged for some years in making preparations for the digest planned by Morton. Nothing came of it, but he was rewarded for his services by the grant of an annual pension of ten chalders of meal out of the revenue of the Abbey of Aberbrothock.³ His rise at the bar was rapid; but, though fond of retirement, he was unable to confine himself to private practice or legal study. When the King was about to marry the Princess Anne of Denmark, Sir James Melville was sent as an ambassador to the Danish Court. He selected Skene to go with him. The King said there were many better lawyers than Skene. "He is," answered Melville, "best acquainted with the conditions of the Germans, and can make them long harangues in Latin, and is a good, true, stout man, like a Dutchman."⁴ This

¹ Act. Parl. Scot. iii. 40.

² *Ibid.* 89.

³ Tytler, Life of Craig, 244.

⁴ Melville's Memoirs, 366. Skene's previous travels in Denmark had made him a good scholar in the northern languages, "Joannes Skenæus . . . adoles-

embassy did not start. But soon afterwards another was despatched, on which Skene was appointed. His conduct was approved, and, soon after his appointment as King's Advocate, when James attempted to make peace between Spain and England, he was sent on an embassy to the Palsgrave, the Duke of Saxony, and the Marquis of Brandenburg, for the purpose of persuading them to intervene for the establishment of peace.¹

Macgill, in the meantime, was at home, busy in repelling charges of corruption which were made against himself and other judges. There can be no doubt these charges against the purity of the Court of Session were well founded. Some of the poems and satires of the day may have been written by persons who had been unfortunate in litigation. But judicial morality must have been very lax, when judges were called on to declare on oath that they had not obtained their appointments by bribery. The door was, indeed, open for bribery under a system which permitted the judges to elect their own colleagues; and the judges of Scotland did not scruple to take money either from suitors, or from rich advocates who aspired to the bench. The judges defended themselves by pleading, as a body, that they had a right to "try themselves," but at the same time attacked each other as individuals. A violent quarrel seems to have taken place between the King's Advocate and one of his colleagues on the bench, John Graham of Halyards, each of them, says a chronicler of the time, "accusing utheris of bryberie and kneavrie."² It was proposed to dismiss some of the corrupt judges; but Macgill remained in office.

The Court of Session was, at this time, the scene of shameless bribery and corruption. The Justice Court and

centiam in Norwegia, Dania, Sarmatiaeque magna parte consumpsit, ubi et linguas didicit exactissime boreales, et mores polivit."—Dempster, *Hist. Eccles. Gentis Scotorum*, ii. 600.

¹ Tytler, *Hist. Scot.* ix. 49.

² Moysie's *Memoirs*, 84.

the Council Chamber were, on the other hand, the scenes of most horrible cruelties. A mania for trying witches seized the minds of those in power.¹ The King was often present, and his Majesty's Advocate, who frequently appeared for the prosecution, took care to inflict more exquisite tortures on such occasions, in order to gratify the royal curiosity. An iron frame was fixed round the legs of some unhappy woman, and thrust into a furnace. As the iron grew hotter and hotter, and burned into the flesh, the Advocate put questions to her. Sometimes a rope was tied round the victim's head, and drawn tight till the eyes started from their sockets. Another torture was pushing needles under the nails, or pulling the nails out with pincers. All these tortures were sometimes inflicted on the same person. They were as legal in the sixteenth century as the cross-examination of a witness is in the nineteenth century. The King, and the King's Advocate, bishops, ministers of the Church, and privy councillors were present, and regarded with indifference the blood, and sweat, and yells of the unhappy victims. By these means a confession was extorted, often of a character which seems quite inconsistent with the charge of witchcraft. One wretch, accused of holding conversations with the devil, declared that when she met the fiend, she said, "God speid ye, good-man!" to which the devil replied with the exclamation, "Santa Maria!" But to extort a confession of witchcraft was the end in view. It was extorted, and written down. Then came the so-called trial. The Justice-Clerk prepared an indictment, and the Advocate laid it before a jury, who compared it with the confession made under torture. The witch was found guilty, put into a cart, taken to the Castle-hill of Edinburgh, strangled, and burnt to ashes. The King's curiosity was satisfied, and the Treasurer looked

¹ Moysie's Memoirs, 85. *

after the escheat. James was much praised for his courage in being present at these strange scenes in the administration of the criminal law. It was feared by some that harm might be done to him by the dealers in charms and familiar spirits. But the more faithful and intelligent of his people knew that the King was the child and servant of God ; whereas the witches were the daughters and slaves of the devil, who would bring them to ruin.¹

Soon after Skene had returned from his mission to the German Courts, he was sent as ambassador to the States-General. But, in the following year, he was employed in the more congenial task of compiling a digest of the law of Scotland. This led to the production of those works which gained him so great a reputation among the jurists of his time. In 1592 a Commission was appointed to decide which of the Statutes passed during the last two Parliaments should be printed, and to consider all the other municipal laws and Acts of Parliament, “quhair of thair is Registeris or autentik monumentis extant.”² The object of appointing this Commission was that the laws of the realm might be published to the lieges, and “make them inexcusable of ignorance.” One of the commissioners was Skene, on whom his fellow-commissioners laid the burden of performing the whole work. As the result of his labours, he published, in 1598, two works, a collection of Acts of Parliament, and a useful volume which is called “De Verborum Significatione.”³ The Estates passed an Act for promoting the sale of Skene’s Collection of Statutes, the terms of which seem to imply that the Court of Session was to have power to

¹ A True Discourse of the Apprehension of Sundry Witches ; Law’s Memorials ; Pitcairn, i. ii. 49-58, 213, etc. ; Hume, Crim. Com. i. 471-479.

² Act. Parl. Scot. iii. 564.

³ It was a Law Dictionary, containing, in particular, “The exposition of the termes and difficill wordes contained in the Foure Buikes of Regiam Majestatem.”

compel all persons, who could afford it, to purchase the volume.¹

In the Act providing for the sale of his work, Skene is styled Clerk Register. He was no longer King's Advocate. Alexander Hay, Clerk of the Register, having died in 1594, Skene had been appointed to succeed him, and at the same time had been made a judge of the Court of Session. He had also been one of the Octavians, the eight Lords of Exchequer who managed the King's affairs during the years 1596 and 1597.²

Skene now spent nine years in a task of greater magnitude. He proceeded to investigate, and collect for publication, the most ancient laws of the realm. The difficulties against which he had to struggle were great. He found himself "fallen into an Augean stable, which scarce the labour of a Hercules could suffice to cleanse or purify." He had to wade through piles of worm-eaten parchment, to interpret obsolete terms of law, and to correct the errors of careless clerks. But, he says, "as the bear reduces its offspring to some degree of shape by a process of continual licking,³ so have I, by assiduous labour, endeavoured to render this publication, which I dare not yet pronounce sufficiently finished or matured, of some benefit to my country."⁴ This work was finished in 1607, when Skene presented the manuscript to the Privy Council. The Council presented an address to the King, praising Skene, and stating that, as his fortune was not equal to his "wit, genius, and literature," and he therefore could not afford to print his work, they recommended his Majesty to

¹ Act. Parl. Scot. iv. 165.

² Act. Parl. Scot. iv. 98. Scotstarvet says he succeeded to the place of Clerk Register "by the moyen (interest) of my Lord Blantyre, his brother-in-law, for their wives were two sisters."—Stag. State, 121.

³ "Ut igitur ursus informem partum lambendo informat."

⁴ Regiam Majestatem, Latin ed., Dedication to the King; Tytler, Life of Craig, 248, 249.

have it published under the direction of Government. An Act was accordingly passed, ordaining the manuscript to be printed, the expense to be defrayed by a tax laid upon the judges and the members of the Estates.¹ In 1609 Skene published two editions of his work, one in English, and one in Latin, and is said to have made a large sum of money by the sale.

Skene's reputation as a jurist and an antiquary stood high for many years. The volume which he published is well known to every Scottish lawyer. It contains the Laws of Malcolm the Second, the Four Books of Regiam Majestatem, the Quoniam Attachiamenta, or Baron Laws, and the Statutes of some of the early kings. For a long time the value of Skene's labours was never called in question. But the Regiam Majestatem is now regarded as unauthentic, the best authorities holding that it is not a treatise on the ancient law of Scotland, but is based on Glanville's treatise "*De legibus et consuetudinibus Angliæ*." This opinion was held by the learned Hailes, by Stair, and by Sir Walter Scott, who thought it had probably been published in Scotland by Edward the First, "with the artful design of palming upon the Scottish Parliament, under the pretence of reviving their ancient jurisprudence, a system as nearly as possible resembling that of England."²

Skene died three years after the publication of his celebrated work. In 1612 he prepared a resignation of his office of Clerk Register. This document he gave to his son James, with directions to go to London with it, but not to present it to the King unless he got a promise of the place for himself. James Skene went to London, but was no

¹ Act. Parl. Scot. iv. 378, 379.

² Hailes, *Annals*, iii. 275-326; Stair, *Instit.* i. i. 16; Scott, *Border Antiquities*, *Introd.* xxv, xxvi; Erskine (*Instit.* i. i. 32-35) and Bankton (*i. i.* 75) take the other side. "*Auctor eorum librorum fuit Raulphus de Glanvilla, comes Cestriæ, . . . qui tractatum de legibus et consuetudinibus Angliæ, regnante Henrico II. edidit.*"—Craig, *Jus Feudale*, i. viii. 11.

match for Sir Thomas Hamilton, the able politician who was afterwards first Earl of Haddington, who induced him to give in the Clerk Register's resignation, abandon all claim to the office, and take the place of an ordinary Lord of Session. When old Sir John read of the way in which his son had been taken in, he turned his face to the wall, and soon after died. "And the case indeed," says Spotiswoode, "was pitiful, and much regretted by all honest men; for he had been a man much employed and honoured with divers legations, which he discharged with good credit, and now in age to be circumvented in this sort by the simplicity or folly of his son, 'twas held lamentable."¹

Skene had survived Macgill, his colleague in the office of King's Advocate. Soon after Skene commenced his researches into the old laws, we find Macgill in the turmoil of public affairs, still doing all he could to thwart the wishes of the Church party, by whom a prosecution of the Popish Earls, Huntly and his friends, for treason, on the ground of their correspondence with Spain, was eagerly desired. The King wanted delay, and through the ingenuity of the Advocate no prosecution took place.²

In 1594, when Skene became Clerk Register, William Hart of Livielands was appointed joint Advocate with Macgill. He was an able man, but his career as King's Advocate was short and uneventful. He was made a Justice-Depute, and is chiefly to be remembered as the presiding judge at the trial of the Six Ministers in 1606.

Macgill died in 1596. The Octavians had made great efforts to induce him to resign his place of King's Advocate. He was old and feeble; but he would not resign. He was threatened and bullied, and sometimes was nearly terrified into submission; but he remained obstinate to the end.

¹ Hist. 517.

² Tytler, Hist. Scot. ix. 100; Calderwood (Wod. ed.), v. 254, 255.

The Octavians then appointed Thomas Hamilton as an additional King's Advocate. The chagrin which Macgill felt at this is said to have killed him, or at least "haisted his auld decrepitate dayes to the death." But he had been ill for a long time, and public business had been delayed, many years before, on account of his bad health.¹ He probably died of old age. The story of his deathbed is preserved in the quaint language of James Melville. He was, says Melville, a man of great talent, but "without all sense of God," and a scoffer at the ministers of the Church: "Bot, or he died, with a terrible strak of conscience, God tamde him lyk a lamb; sa that Mr. Andro² coming to him againe, and I with him, was as the Angell of God in his eis; cust his hat to the ground, and could skarslie luik him in the face, till he heard out of his mouthe the words of consolation, the quhilk he gaped for as a gorbet, and receavit as Cornelius the instruction of Piter; yea, the meimest of the ministerie that cam to visit him was mair to him than giff the King and the Lords haid com to him. I thought often that was a cleir accomplisment of Esaias prophecie, 'The lyon sall eat stra lyk a bullok,' etc. He died maist happelie and sweitlie, efter diuers yeirs humiliation, with these words in his mouthe, 'Lord, in thy light, let me sie light.'"³

¹ Cal. State Papers, 1509-1603 (Scotland, i. 452); Bowes to Walsingham, 8th Aug. 1583.

² Andrew Melville.

³ Melville's Diary, 96.

CHAPTER IV.

SIR THOMAS HAMILTON.

THOMAS HAMILTON, who succeeded Macgill as King’s Advocate, was the eldest son of Sir Thomas Hamilton of Priestfield and Elizabeth Heriot, daughter of James Heriot of Trabroun. He was born in 1563, and sent at an early age to study law in France. After a residence of six years in that country, he returned to Scotland, and was called to the bar on the 1st of November 1587.¹

“Tam o’ the Cowgate,” as he was nicknamed, received speedy promotion. On the 2d of November 1592 he was raised to the bench, with the title of Lord Drumcarnie, and soon after was appointed a member of the Law Commission which led to the legal researches of Sir John Skene. But “Tam o’ the Cowgate” took no interest in the antiquarian studies which delighted Skene. The study of law was with him merely a means to an end, for he had already embarked on a career of political ambition which has never been equalled at the bar of Scotland. Nor was it long before he came to take a leading part in State affairs.

At this time the condition of the Scottish revenue was alarming. Everything was going wrong; and there was not money enough in the Treasury to pay the salaries of the officers of the Crown. The Secretary had gone to England, in the previous year, and tried to induce Elizabeth to remit to Scot-

¹ Douglas’ Peerage, i. 678.

land certain sums which she had promised. It was in vain. There was nothing to be got from England. James suspected that, poor as Scotland was, he did not get fair play from his Treasurer, Comptroller, and Collector. But he might not have dismissed them had not a domestic incident called his attention to the fact that, while Queen Anne's Councillors were always ready to supply her wants, he himself was always in want of money. On the 1st of January 1596, the Queen gave him, as a New Year's gift, a purse of gold. "Where did you get this?" asked the King. "From my Councillors," was the answer, "who have but now given me a thousand pieces in a purse! When will yours do the like?"¹ The King, who had now given up all hopes of help from England, and was anxious to make the best he could of the revenue of Scotland, took the hint given to him by the Queen, and dismissed some of his ministers. In their places he appointed the Queen's Councillors, Lord President Urquhart, John Lindsay, Parson of Menmure, John Elphinston of Innenochty, and Thomas Hamilton. To these four were soon after added Sir John Skene, then Clerk Register, Sir David Carnegie of Calluthie, Walter Stewart, Prior of Blantyre, and Peter Young of Seton. These eight persons were appointed Commissioners of the Exchequer, and, from their number, were called the Octavians. The terms of their commission were wide. The entire management of the revenue was put into their hands. They had power to discharge and appoint inferior officers, to inspect the accounts of all public servants, to prescribe penalties for offences, to fix the price of wine and corn, to manage the royal household, to put the customs up to auction, to control the coinage, and to superintend the conduct of all the inferior judges. The rank, in Council and Parliament, of Officers of State was conferred upon them.²

¹ Tytler, *Hist. Scot.* ix. 210.

² Spotiswoode, 413.

Powers so extensive could not fail to excite envy. It was declared that the King had bestowed on the Octavians the whole power of the State, and had kept nothing for himself but the naked title of King. The gentlemen-in-waiting were up in arms. As the King had grown poorer, they had grown richer ; and they now saw that the searching inquiries made by the Octavians would put an end to all their chances of plunder, and that the rigid economy of the new officials would stop much of that profusion which had made life at Court so pleasant and luxurious. The Cubiculars, or bed-chamber party, were therefore in violent opposition to the Octavians. "The chief Octavians," we are told, "wer President Seaton, Sir James Elphingstoune, Mr. Thomas Hamilton, the King's Advocat, and Secretar Lindsay. The chief Cubiculars were Sir George Home, after Earle of Dunbar, Sir Patrick Murray, and his brother David Murray, afterwards Lord Scoone, both brethern of the house of Balvard."¹

But the Octavians were not unpopular merely on account of their extensive powers, or because of their financial reforms. Influenced by the ambition of "Tam o' the Cowgate," who had set his heart on being King's Advocate, they proceeded to seize all the offices of State. They began with Macgill, the King's Advocate. He was pressed to resign, "by reason of his age and imbecillity, as they pretended."² The old man would not give up his place. Hamilton was then appointed joint Advocate, on the 31st of January 1596 ; and soon after Macgill died.

Hitherto there had been, as a rule, two King's Advocates at the same time. This practice now ceased. Hamilton had not only succeeded in making himself King's Advocate, but he was resolved that no one should share the dignity and influence of the office with him. On Macgill's death he

¹ Scot, Apologetical Narration, 83.

² Spotiswoode, 414.

induced the King to give him a letter, in which he was appointed sole Advocate for life, "in respect that the said office may be better handled, and with less cost to the subjects, when one qualified, discreet, and diligent man gives himself wholly thereto, and bears the full charge in his own person, than when the charge referred to is committed to two or more." Hart of Liviellands, however, who had succeeded Skene as Advocate in 1594,¹ acted as joint Advocate with Hamilton till 1597, when he became a Justice-Depute. But, as a general rule, there was, after Hamilton's appointment, only one King's Advocate.

Having begun by securing the position of King's Advocate for one of their number, the Octavians soon acquired all the offices of Government. But they were not long in power. James wished to restore the Popish Earls; in this he was supported by the Octavians; and the Cubiculars used this fact as a means of destroying their opponents. The Church became alarmed, and the Octavians were openly abused. Hamilton, in particular, was spoken of, in a letter which was afterwards sent to the King, as "Mr. Thomas Hamilton, brought up in Parish,² with y^t apostat, Mr. John Hamilton, and men say that the dregs of his stinking Roman profession stick fast in his ribbes."

David Black, a minister of the Church, was loud in his abuse of Queen Elizabeth and King James. He declared that Elizabeth was an atheist, and James a child of Satan. He was summoned before the Privy Council, but declined its jurisdiction. In this he was supported by the mass of the clergy, and a deputation was sent to the Octavians to inform them that they were to blame for all the troubles which menaced the Church.³ The Octavians pressed the King to bring Black to trial. He was summoned, but did not appear, and was condemned, in absence, for the slanders

¹ *Supra*, p. 67.

² Paris.

³ Spotiswoode, 423.

which he had spoken. This excited the indignation of the Church, and the Cubiculars became more and more active in their intrigues. Some members of the Church party waited on the King, and informed him that they considered the Church in danger. The conference was interrupted by a disorderly crowd, which surrounded the Tolbooth, where the Council was sitting. The rioters demanded that Seton and Hamilton should be put into their hands; and the clergymen demanded that they should be excluded from the Privy Council when questions affecting the Church were under discussion. There was a dangerous riot. Seton and the Advocate, however, escaped in safety. On the following day the King issued a proclamation, removing the sittings of the Court of Session from Edinburgh. This was a severe blow to the tradesmen of the city; but the clergy, who had nothing to lose, were undaunted. It was proposed to excommunicate the President and the King's Advocate; but this step was delayed.¹

The Privy Council passed an Act declaring that the rioters were guilty of treason; and it was believed that severe measures would be taken. The Church party were now alarmed; and the people of Edinburgh were thoroughly cowed when they heard that their Provost and Magistrates were in danger of punishment for what had taken place. A convocation of the Estates was held at Holyrood, and the government of the Octavians came to a sudden end. They had been eighteen months in office. "Never," says Spotiswoode, "were the rents of the Crown so thriftily and so rightly used, as in that short time of their employment." They had been, it appears, most careful and efficient; but their unpopularity with the Church rendered it politic in the King to accept their resignations. The experience which Hamilton had, during those eighteen months, of the Presby-

¹ Spotiswoode, 431.

terian clergy laid the foundation of that bitter hatred which he ever after felt towards them.

Though the Commission of Exchequer was at an end, Hamilton remained in office as King's Advocate. The dislike with which he was regarded became greater when it was found that he insisted on acting as a judge in the cases in which he appeared for the Crown as counsel. In consequence of the clamour which was caused by his conduct on this point, an Act of Sederunt was passed which declared that he was not to be regarded as a party in such cases.¹

It was about this time that the title of "Lord" Advocate was first given to the King's Advocate, in his capacity as a law officer. The trial of Arnot of Woodmiln, on the 3d of November 1598, is said to be the first instance of his being marked on the record of Court as Lord Advocate.² In the records of Parliament he had been styled Lord Advocate before this. The title of "Lord" was common to all members of the Scottish Government. The Treasurer was the Lord Treasurer; the Secretary of State was the Lord Secretary; and the same rule applied to the Advocate.

Hamilton, now knighted under the title of Sir Thomas Hamilton of Monkland, was Lord Advocate for the next fourteen years; and, during this long period, he was more famous as a statesman than as a lawyer. The removal of the Court to London, on the death of Queen Elizabeth, made no difference in the duties of the Lord Advocate. The government of Scotland was placed in the hands of the Privy Council of Scotland. This, to a certain extent, increased the power of every Officer of State; but their various functions remained unaltered. The centre of influence was, however, at Court; and thus we find that, after 1603, the Lord Advocates spent much of their time in London, and,

¹ Act. Sed. 22d Feb. 1597.

² Hume, Crim. Com. ii. 131.

when in Scotland, were in constant correspondence, on affairs of State, with the King and his English Councillors.¹

In 1604 Hamilton was one of the Scottish Commissioners appointed to treat for a Union with England. The first meeting of the Commission was to take place at Westminster on the 20th of October. On the 28th of August the King wrote to the Lord Advocate, stating that he intended, before the Scottish Commissioners came up, to hold a meeting of the Privy Council of England for the purpose of discussing the questions of the coinage and the customs, with the view of making them uniform throughout the countries. His Majesty, therefore, desired the Lord Advocate to be at Hampton Court before the 20th of September, "because your advice is specially requisite in these matters, as belonging to your office."² The articles of the intended Union contained no proposals as to the coinage, but the adjustment of the customs was the subject of elaborate arrangement. That Hamilton took a creditable part in the negotiations is proved by the confidence which the King felt in him ever after, and by the high opinion which was entertained of him by the statesmen of both countries.

The proposed Union having come to nothing, Hamilton returned to Scotland, where he found his hands full of legal work. The General Assembly of the Church, which was to have met in July 1604, had been adjourned on account of the negotiations for Union; and in the following year the King again ordered it to be abandoned. This was resented

¹ A large selection from the correspondence of Sir Thomas Hamilton is printed, under the title of "State Papers and Miscellaneous Correspondence of Thomas, Earl of Melros." (Published by the Abbotsford Club, 1837.) King James had not been long in England before he was impressed by the fine clothing of the English dignitaries, and felt ashamed of the mean garb which, on ordinary occasions, was worn by public men in Scotland. The result of this was that the judges of the Court of Session were ordered to put on the purple robes which are still worn by the Scottish bench; and the advocates were arrayed, for the first time, in their black gowns.

² James the Sixth to Lord Advocate, 28th Aug. 1604.—Melros Papers, i. 5.

by the Church, and some of the ministers were imprisoned for refusing to obey and holding an Assembly. When called on to defend themselves before the Privy Council, they declined to recognise its jurisdiction, and, on account of this "declinature," were indicted on a charge of treason. Their trial was a notable instance of official wrong-doing. The Lord Advocate conducted the prosecution with a total disregard of fairness. Hart, Hamilton's colleague when he was appointed Advocate, and now a Justice-Depute, was the presiding judge, and did not even pretend to be impartial. The jury, packed though it was, returned a verdict of guilty only under great pressure. The story of this trial will be given in the next chapter; but Hamilton's conduct is condemned on his own showing. The trial took place on the 10th of January 1606, and on the following day the Lord Advocate wrote to the King, informing him of the means which had been taken to obtain a conviction. The jury, he said, had been packed, and unless that had been done, the accused would have been acquitted.¹

When the trial of the six ministers was finished, and while they were awaiting their sentence, which depended on the pleasure of the King, the Lord Advocate went to London. James was bent on introducing Episcopacy into Scotland, and had now hit on what he thought was a good means of overcoming the resistance of some of the leading ministers. In May 1606, eight letters were sent from London, addressed to eight ministers, asking them to come to Court for a conference on the state of the Church of Scotland.² They were requested to be in London by the 15th of September. They obeyed the royal summons, and the story of their adventures at Court forms a curious

¹ Lord Advocate Hamilton to James the Sixth, 11th Jan. 1606.—Melros Papers, i. 10-12.

² Calderwood, 518.

episode in the history of the attempts made by James and his advisers to destroy the Church of Scotland.

Four of the ministers went by sea, and reached London in about ten days. The rest rode up, and, taking some weeks to the journey, met their companions in London at the end of August. They now became the objects of most assiduous attentions from the leaders of the Church of England. The Archbishops of Canterbury and York invited them to become their guests; but the Scotsmen, with habitual caution, declined, on the ground that they did not know where the King wished them to live. Alexander Hay, at that time Secretary of State for Scotland, explained that it was the King's pleasure that they should live at Westminster till the 20th of September, when his Majesty would see them. Again the caution of the Scotsmen made them doubt, and they sent one of their number to the King, to see if it really was as the Secretary of State had said.¹

On the 19th of September, the Dean of Salisbury waited upon the eight ministers, "to make them pliable as much as he could," and next day went with them to Hampton Court. The King was at dinner when they arrived. They were brought in without delay, and kissed hands, while his Majesty sat at table. Not a word was said about Prelacy, Presbytery, General Assemblies, or Synods. One of the ministers had a very long beard; the King quizzed him about it. "How were things going in Edinburgh?" he asked. "What were the magistrates doing about the plague?" Soon James dismissed them kindly, and the Dean invited them to dinner. After dinner, they were taken to hear a Bishop preach a sermon, by which he hoped to convince them that Episcopacy was better than Presbytery. Next day the Secretary of State for Scotland took them to the Presence-Chamber, where they were courteously received

¹ Calderwood (Wod. ed.), vi. 560.

by the Archbishop of Canterbury. The King soon entered, with the Earl of Dunbar, the Lord Advocate, and other members of the Council. None were allowed to remain in the room except members of the Scottish Government. The King explained his wish to find some means of bringing peace to the Church of Scotland. A long conference took place, at the end of which nothing had been done. Next day another conference took place. It was not limited to the Scottish officials. The Archbishop of Canterbury stood at the King's right hand; the Prince of Wales was there; English peers, and some of the great Officers of State, were present; behind the tapestry was a party of Bishops and Deans, who now and then peeped out to see how the Scots were looking.¹

The ministers were questioned one by one. They answered on their knees; but all declared in favour of a Free General Assembly, which was precisely what the King did not wish to grant. When the conference was nearly at an end Andrew Melville asked leave to speak, and denounced the unfair way in which the trial of the six ministers, at which he had been present, was conducted. He turned to the Lord Advocate, and attacked him. "My Lord," he said, "you would do God and his Majesty better service if you bended your forces and speeches against your uncle, Mr. John Hamilton, a seminary priest, and one Mr. Gilbert Broun, Abbot of Newabbey, who have infected a great part of Scotland with their superstitious dregs of Popery. But these men's heads you have clapped, and shut up the faithful servants of Christ in prison. And still, my Lord, you show yourself possessed with the same spirit, for you think it not enough to have pleaded against them in Scotland, using all the skill and cunning you had, but still you continue *κατήγορος τῶν ἀδελφῶν*." At these

¹ Calderwood, 539.

words the King turned to the Archbishop of Canterbury, and said, "What's that he says? I think he's calling the Advocate out of the Revelation Antichrist: nay, by God, he's calling him the very Devil."¹

This conference came to nothing. Still the ministers were detained in London, and compelled to hear endless sermons, when altars, basins, and candlesticks were displayed in great profusion, in the hope of making the ritual of the Church of England attractive to them. They were called to a meeting of Scottish Privy Councillors, which was held in the Earl of Dunbar's mansion. The King was not present. James Melville, the nephew of Andrew, was called in, and Hamilton put a number of questions to him. He declined to answer. "I am," he said, "a free subject of the kingdom of Scotland. No summons has been executed against me, and I am bound by no law to furnish matter of accusation against myself." The Lord Advocate pressed him to answer, but he refused, and said that though he had not studied the law, as his Lordship had, he had learned his logic and taught it in schools. The others were called in, but all refused to answer the Lord Advocate's questions.

After this there were more sermons, more dinners, more altercations between Melville and the Lord Advocate. The end of the Scottish ministers' visit to Court did not come till May 1607, when they were all dismissed from London except Andrew Melville. Melville had written a Latin epigram, in which he laughed at the ritual of the Church of England. Being called before the Council, he caught the Archbishop of Canterbury by his lawn sleeves, and called them "Romish rags." He was at once sent to the Tower, where he was imprisoned for nearly four years. On his release, which was granted on the condition that

¹ Calderwood, 541.

he would leave the kingdom, he went to the University of Sedan, where he died in 1622.

From the Hampton Court Conference Hamilton returned to Scotland triumphant. His party was henceforth in greater favour than ever with the King, who had now made up his mind that Episcopacy must be forced upon the people of Scotland, and that the Lord Advocate and his friends would do all in their power to carry out this policy.

Soon after this Hamilton had the pleasure of seeing his father raised to the bench, under the title of Lord Priestfield. In 1605 a series of new rules had been made regarding admissions to the bench, and Lord Priestfield's appointment was the first which took place after their introduction. According to these regulations the Court kept a list of six advocates, from whom the King might select one for promotion. It was provided that the new judge must be one of "the ancient, wise, and learned advocates, who have given best proof of their wisdom, learning, honest and good behaviour, in the exercise of their office of procurator." He had to swear that he had not obtained his appointment by corrupt means, and to pass a satisfactory trial in "literature and learning." Lord Priestfield underwent this ordeal, and "discoursed in latine the space of ane quarter of ane hour, and ressonit on the causes to all the saids lordis contentment." On this occasion the Lord Advocate wrote to the King a letter which is a good example of the tone of adroit adulation which he always used when addressing his royal master.¹

Hamilton was Lord Advocate for six years after this. In 1611 the Earl of Dunbar died. This made a vacancy in the office of Lord High Treasurer of Scotland, which was

¹ Act. Sed. 31st May 1605; Melros Papers, i. 26; Brunton and Haig, 245, 246, where Lord Advocate Hamilton's letter to the King, dated 29th May 1607, is printed from the Denmiln MSS. (Advocates' Library, 33. 1. 1-15.)

filled up by the appointment of Sir Robert Ker, then the ruling favourite at the Court. The new Treasurer was soon after made Earl of Somerset, and places and favours were showered on all his friends. The Lord Advocate partook of these good things. His third wife was the widow of Sir Patrick Hume of Polwarth, and sister of the Earl of Somerset.¹ Somerset procured for his brother-in-law the places, first of Lord Clerk Register, and soon after of Secretary of State in the Scottish Ministry.

The appointment of Hamilton as Clerk Register was unpopular. His capacity was undoubted, but the circumstances under which he took office were discreditable.² In the spring of 1612 a young man arrived at Court from Scotland. This was James Skene, son of old Sir John Skene, at that time Lord Clerk Register. He carried his father's resignation in his pocket, but he was on no account to present it unless he got a formal promise that the place would be given to himself. The task which Skene had to perform was beyond his powers. He was not so astute as most of the Scotsmen who went to London; he was unacquainted with the intrigues of a Court; Hamilton, whose keen eye saw a chance of further promotion, took no part in what was done; but there was no lack of courtiers and place-men ready to serve the brother-in-law of Somerset. Skene was set upon. "Abused by politick wits," he gave up his pretensions to be made Clerk Register, presented his father's resignation on condition of being himself made a judge, and returned to Scotland.³ Hamilton was at once made Lord Clerk Register, and Sir William Oliphant succeeded him as Lord Advocate.

Soon after this Hamilton induced Sir Alexander Hay to exchange places with him, and thus became Secretary of State for Scotland. In November of the following year he

¹ Douglas' Peerage, i. 679, 680.

² Spotiswoode, 517.

³ *Ibid.* 517.

was raised to the peerage, as Lord Binning and Byres ; and in 1616, on the death of John Preston of Fentonbarns, he was made President of the Court of Session, an office which he combined with that of Secretary of State.

On the bench Lord Binning gave ample proof of the great talents which had raised him to eminence. He was not only a very great lawyer, but in deciding questions of fact he displayed that readiness of resource, that knowledge of men, and that power of judging character, which he had gained in the course of his busy public life. Once the judges were puzzled for want of evidence that a document was forged ; but the Lord President solved the difficulty at once by holding the paper up to the light, and finding that the stamp was of a date later than the time at which the document was said to have been written.¹ At that time it was very difficult to induce a Highlander to swear truthfully, if a lie could benefit his chieftain. Lord Binning was, however, more than a match for the Highland witnesses. A story is told of how one Highlander, who had just been examined, met, at the door of the Court, a friend on his way to the witness-box. The new-comer asked him what he had said. He replied that he was afraid he had told the truth, and warned his friend to "beware of the man with the partridge eye."²

Lord Binning took his seat as Lord President on the 15th of June 1616. In May 1617 the King came to Scotland, where he remained till the month of August. At the commencement of the seventeenth century, when the Court was removed to London, the Scottish Parliament began to resent the power which the Crown had over the decisions of the House by means of the Officers of State. The Officers of State were members of Parliament without election, and voted both with the Lords of the Articles and in divisions

¹ Forbes, *Journal of the Session*, Pref. xxvii.

² *Ibid.*

in Parliament. Outside the Parliament House they were supreme. They did not hesitate even to prevent freedom of discussion in the Courts of Law. On one occasion a question arose as to the power of the Privy Council to appoint a Justice-Depute. The point had been debated at the bar of the Justice Court. The Secretary, Treasurer, and Clerk Register went to the Court, ordered the Justice-Clerk to delete from the books all mention of the debate, and told the advocates who had spoken "that if thereafter any should presume to make the like question, the rigour to be used by the Council in their punishment should make them know and feel their power."¹

Overbearing conduct like this raised murmurs so loud that when the King came to Scotland he found it necessary to make new ministerial arrangements. By an Act of Council it was declared that the number of the King's Ministers who could vote with the Lords of the Articles or in Parliament should, in future, be limited to eight.² These eight great Officers of State were, in order of precedency, the Lord High Treasurer, the Privy Seal, the Secretary, the Clerk Register, the Lord Advocate, the Justice-Clerk, the Treasurer-Depute, and the Master of Requests. It was declared that, although the number of these officers might be increased by the appointment of deputies, or of two persons to the same office, yet only eight should sit in Parliament as Officers of State.³

The Estates were satisfied; but the people began to complain that the ritual of the Church of England was performed, with much pomp, in the Chapel-Royal at Holyrood, and, when the King left Scotland, it was rumoured that serious innovations were to be forced upon the Church. This rumour was well founded. A General Assembly was sum-

¹ Melros Papers, i. 281.

² Act of Council, 17th June 1617.

³ Act. Parl. Scot. iv. 526, 527; Sir George Mackenzie's Works, ii. 537.

moned to meet at Perth in August 1618. Lord Binning was appointed Royal Commissioner, along with Lord Carnegie and Lord Scoone, and did all he could to lower the opponents of Episcopacy. The Archbishop of St. Andrews presided. Near him sat Binning and his fellow-Commissioners, surrounded by a number of bishops and barons. The Dean of Westminster, who was present, had a chair; but the ministers of the Church of Scotland were told to stand in the background. The King was anxious to know the result of the deliberations; and, during the sittings of the Assembly, Binning was in constant correspondence with his Majesty.

The King's object in calling the Assembly was to procure the adoption of the five points, afterwards known as the Five Articles of Perth, which were touched on in a letter from him to the Assembly. Binning had great doubts whether they would be carried, but he left no stone unturned in his endeavours to persuade or coerce the members of Assembly into voting as the King wished. He was successful. After much debate the Articles were carried by a majority of eighty-six votes to forty-one. The Five Articles ordained that the Communion was to be taken kneeling; that it might be administered to a sick person in private; that children were to be baptized on the first Sunday after birth, and in church, unless under very special circumstances; that all young children were to be taught the Lord's Prayer, the Creed, the Ten Commandments, and presented to the Bishops to receive their blessing; and that special services should be held to celebrate Christmas, Easter, the Ascension, and Pentecost.¹

As soon as the voting was over, Lord Binning sat down and wrote to the King an account of his proceedings, which contains clear evidence that he had been far from scrupulous in the means which he used to obtain a favourable vote.

¹ Spotiswoode, 538, 539.

When the Articles were carried orders were given that they should be intimated to all persons, and the ministers were enjoined to exhort their congregations to obedience.¹ The Bishops worked hard to secure the compliance of the clergy. But the people were obdurate, and Lord Binning had to inform the King that the Five Articles would be disregarded by many of the ministers.

When Easter arrived Binning wrote notes to the judges, privy councillors, and magistrates, requesting them to march in procession to church. Some did so, and took the Communion kneeling. But many of the citizens refused to comply with the King's wishes, and, leaving the town, went to country churches, where the ministers were non-conformists.²

Lord Binning's services were rewarded. By letters-patent, dated Newmarket, 20th March 1619, he was created Earl of Melrose. He continued to hold the high offices of Secretary of State and President of the Court of Session during the rest of James the Sixth's reign.

James the Sixth died in March 1625. Charles the First, soon after he came to the throne, intimated that no Officer of State or nobleman was, in future, to have a seat on the bench of the Court of Session. On this, Lord Lauderdale, Lord Carnegie, and Lord Advocate Oliphant ceased to be judges; and the Earl of Melrose had to resign the office of Lord President. The new President was James Skene, who, many years before, had come to London in quest of the office of Clerk Register, and who had been so cajoled by the "politick wits" of the Court. Since that time he had been acting as an ordinary judge, and, though very nearly dismissed for nonconformity at Easter 1619, must have been a man of some influence, as he was now made

¹ Spotiswoode, 538, 39.

² Melros Papers; Calderwood (Wod. ed.), vii. 359.

President, an office which he held till his death in the year 1633.¹

Lord Melrose also resigned the office of Secretary of State, and was appointed Lord Privy Seal. In the following year, on the death of Sir John Ramsay, Viscount Haddington, he gave up his title of Melrose, and became Earl of Haddington, on the ground, it is said, that it was more honourable to take his style from a county than from an Abbey.²

Lord Haddington died on the 29th of May 1637, at the age of seventy-three.³ He was succeeded by his son, Thomas, to whom he left a large fortune, the fruits of his practice at the bar, and of the various offices which he held. Part of his wealth, too, was derived from a silver mine which he found on his property near Linlithgow. It is said that when this mine was first discovered, he spread a report that it was of little value, and obtained from the King a grant of all minerals on the estate. But it was soon reported to James that the Lord Advocate's silver mine was of great value, and he desired him to renounce the grant under which he worked it. He did so, but, after some time, the King found that he could not work the mine at a profit, and returned it to its former owner.⁴

The first Earl of Haddington, though he was never popular in Scotland, was regarded with profound respect by the statesmen of his day. The bare mention of the chief offices he held is a sufficient proof of his great talents. For sixteen years he was Lord Advocate; for fourteen years he was Secretary of State; for ten years he was President of the Court of Session. He was also Lord Clerk Register and Lord Privy Seal. He rose from the position of a commoner

¹ Brunton and Haig, 254.

² Douglas' Peerage, i. 678.

³ *Ibid.*

⁴ Balfour, Annals, ii. 22; Calderwood (Wod. ed.), vi. 688. Scotstarvet says: "He got a silver mine, out of which having digged the best part, he then sold it to King James, and got for it £5000 sterl."—Staggering State, 69.

to the rank of a peer. The records of his wonderful industry as a lawyer still remain, covered with dust, among the manuscripts of the Advocates' Library in Edinburgh. As a politician he displayed the same untiring energy. He was for many years Prime Minister of Scotland. His opinions and policy are to be traced in his State papers and correspondence, extending over the eventful years from 1599 to 1625. That period saw the Union of the Crowns, the overthrow of the National Church, and the establishment of an alien system of ecclesiastical government. In all the dangerous measures which James undertook he found a willing servant in Lord Haddington. But, while he did not hesitate to use any means, however harsh, in order to secure the royal supremacy, it must not be forgotten that in his time, and by his talents, public order was maintained in Scotland as it never was before. That was his best service to the Crown. He had immense influence with the King. Lord Haddington was not only a statesman and a lawyer, he was also a courtier, and in the days of James the Sixth to be a courtier was to be a flatterer. Haddington excelled in flattery, as he excelled in everything. His temper was naturally hasty; but to the King he was always submissive. James, he declared, was "the true Solomon of our age, and the most godly, wise, and learned king that ever bore a regal crown in any Christian kingdom."

When Lord Haddington, at that time Sir Thomas Hamilton, resigned the office of Lord Advocate, he was succeeded by Sir William Oliphant of Newton. Oliphant was a leader of the bar, and had attached himself to the Court party from the outset of his career. He was born in 1551, and called to the bar on the 20th of October 1577.¹ In 1604 he acted as an Advocate-Depute. Two years later he played a most unworthy part at the trial of the six minis-

¹ Brunton and Haig, 252, 253.

ters.¹ He had been retained as one of the counsel for the defence, but, on the day before the trial, was persuaded, along with another counsel, to desert his clients. This was kept a secret from the prisoners, who did not know, till the trial was about to begin, that Oliphant and Craig, their senior counsel, had betrayed them. Although it was stated in Court, and not denied, that they had promised to conduct the defence, they declined to appear. The Justice-Depute refused to compel them, and the task of defending the prisoners was thrown upon the juniors.

We next find Oliphant acting on a Commission of inquiry into the state of Latin instruction in the schools. The study of Latin was compulsory on the upper classes in the reign of James the Fourth. After the Reformation it spread among the middle classes. But it had lately fallen off, owing, it was said, to "the curiositie of diverss maisteris of scholis, baith to burgh and land, taking upoun them eftir thair fantesie to teache suche grammer as pleasis them." To remedy the evils caused by the "fantasie" of the teachers, this Commission was appointed with instructions to devise a uniform system of grammar.²

In January 1611 Oliphant was made a judge of the Court of Session, and in June of the following year he became Lord Advocate on the resignation of Sir Thomas Hamilton. A pension for life of £1000 Scots was conferred upon him.³ The Estates also passed an Act approving and confirming "the gift of the office of Advocatrie, given and granted by his Highness to his trusty and well-beloved Councillor, Sir William Oliphant of Newton, Knight, making and constituting him his Majesty's Advocate during all the days of his life."⁴

¹ *Supra*, p. 76.

² Act. Parl. Scot. iv. 374.

³ Stat. 1612, cap. 30; Act. Parl. Scot. iv. 491.

⁴ Act. Parl. Scot. iv. 491. His commission, as ratified in Parliament, was

Oliphant was Lord Advocate during the whole of the time that his predecessor was Secretary of State for Scotland, and acted, along with him, as one of the Councillors appointed by Queen Anne, in April 1617, to manage her estates in Scotland.¹ In 1626, when Charles the First resolved that no Officer of State should be a judge, he retired from the bench. He died on the 13th of April 1628, and was buried in Greyfriars' Churchyard in Edinburgh. On his tombstone was engraved the following inscription:—
“ Here lyes the Confineable part of that most famous man, Sir William Oliphant, most Conscientious King's Advocate, and Most faithful Councillor: To whose living Fame, and to the memory of his Virtues, his most mournful Son placed this Gravestone. He dyed in April 1628, after he had lived 77 years, in the Service of God, of his Prince, and of his Country.”²

When Oliphant became Lord Advocate a quarter of a century had elapsed since the criminal law reforms of 1587, and a great improvement had taken place in the administration of justice. The country was emerging from a state of utter lawlessness. Scotland was, at the beginning of the seventeenth century, the scene of endless crimes of violence. Murder, fire-raising, theft, the maiming of cattle, rape, highway robbery, were matters of daily occurrence. No place was so sacred or so populous as either to terrify the criminal or render it dangerous for him to ply his calling. The church and the churchyard were frequently the scenes of bloodshed. Merchants were often stabbed in the crowded market-place. Edinburgh was accounted the most disorderly town in Europe. It was dangerous to go about the streets after dark. On the road between Edinburgh and

dated Wanstead, 19th June 1612. He first appears as Lord Advocate, in the Justice Court on 11th July 1612.

¹ Balfour, *Annals*, ii. 65.

² *Theatre of Mortality*, 46.

Leith footpads lay in wait to seize passers-by, and demand a ransom for their release.¹ But the law gradually, by slow and painful steps, was gaining the victory, and, firmly administered by Hamilton, was putting some check on the disorders which had prevailed for so long a time.

The Government was severe, even to cruelty, in the case of many prosecutions, and acts of mere indiscretion were sometimes visited with the heaviest penalties. In addition to the notorious State trials, there were many prosecutions, at the instance of the King's Advocate, which are a lasting disgrace to the reign of James the Sixth. Of these none exceeded in vindictive cruelty the proceedings against Archibald Cornwall in April 1601. Cornwall was one of the town-officers of Edinburgh. It was the custom to sell, by public auction in the streets, household goods which had been seized for debt. Cornwall had "poinded," or taken for a debt, some furniture, among which was a picture of the King, and it was his duty to expose it for sale. The place at which the sale took place was close to the public gibbet. Cornwall, in order that the picture might be well seen, knocked a nail into the frame of the gibbet, and was about to hang the picture on it, when some of the bystanders suggested that he should not hang the King's picture in such a position. He at once took it down. This trifling incident was reported to Lord Advocate Hamilton, who indicted Cornwall on a charge of driving a nail into the common gibbet with the intention of hanging the King's picture on it. There was no Statute under which such an indictment could be brought, nor was the accused charged with a crime known to the common law. The prosecution was as arbitrary as it was foolish. Nevertheless Cornwall was convicted, taken to the gibbet, and hanged with a paper on

¹ Lord Binning to James the Sixth, 7th March 1617; Melros Papers, i. 270-278.

his forehead stating his offence. At the end of twenty-four hours he was cut down, and the gibbet burned.¹

Attempts were sometimes made to use the office of the Public Prosecutor for the purpose of gratifying private malice. Unfounded accusations were made in order to induce the Lord Advocate to indict persons who were, in reality, innocent. The Public Prosecutor must, in most cases, be dependent on the character of his informer. At the beginning of the seventeenth century this was peculiarly the case. There were no newspapers, no system of postage, no regular means of communication between the officials in Edinburgh and the provincial authorities. The case of James Lockhart of Lee, in 1611, is an instance of an attempt to impose upon the Advocate. Gideon Weir, a notary of Lanark, lodged a complaint with the Lord Advocate, accusing Lockhart of having, in the exercise of his heritable jurisdiction, put a poor man to death unlawfully. Weir's story was absolutely false, but was so artfully told that the Lord Advocate directed criminal letters to be raised against Lockhart. Before the day of trial came, suspicions had been roused as to the truth of Weir's statements, and an investigation took place, the result of which was that the charge was abandoned. A man of Lockhart's position was able to clear himself; but a poor man would have been in great danger from the imperfect sources of information at the command of the Lord Advocate.²

Oliphant was the first Lord Advocate who examined witnesses, in presence of the accused, to prove the case for the prosecution, or allowed witnesses to be examined for the defence.³ The usual practice was for the prosecutor to produce the indictment, along with the depositions or statements previously made by the witnesses. All the jury had

¹ Pitcairn, *Crim. Trials*, ii. 349-351.

² *Ibid.* iii. 206-208.

³ Trial of Harry Liston, 13th Nov. 1624, Pitcairn, iii. 572-576.

to do was to see if the statements made in the indictment tallied with those in the depositions. Oliphant introduced a new form of procedure. A prisoner, Liston by name, was accused of the murder of James Mayne, servant to one Robert Young. The prosecutors were Mayne's widow, his niece, the Lord Advocate, and Robert Young, "as maister." When the jury had been chosen, Young was sworn as a witness, and spoke to the facts in open Court. The widow also appeared as a witness, and produced her husband's clothes cut by the prisoner's knife. The prisoner then put in a list of witnesses for the defence, one of whom was the foreman of the jury! The jury retired. The witnesses for the defence were called into the jury-room and examined by the jurors in private. Neither the presiding judge, the Lord Advocate, nor the counsel for the defence was present. The prisoner was acquitted. From this curious form of procedure the present system of examining witnesses on both sides, in presence of the jury, has been gradually developed.

CHAPTER V.

SIR THOMAS HOPE.

THE next Lord Advocate was a man who rose to eminence by acts very different from those which Hamilton and Oliphant employed. At the time when Hamilton was securing his place in the King's favour by unvarying submission to his wishes, Thomas Hope, the future champion of the Church against the King, was studying for the bar, to which he was called on the 7th of February 1605.¹ He was the son of Henry Hope, grandson of John Hope, a descendant of the family of Des Houblons in Picardy, who came to Scotland in the train of Magdalene, Queen of James the Fifth. Henry Hope married Jaqueline de Tott, a Frenchwoman. They had two sons, Henry and Thomas. Henry settled as a merchant in Amsterdam, and Thomas became an advocate at the Scottish bar.²

At the time when Thomas Hope came to the bar, James the Sixth was engaged in his lifelong task of destroying the

¹ Among the manuscripts in the Advocates' Library there is a volume of notes on the Civil Law, the first page of which bears the following inscription:—"This and another volume of the Digest was done by my grandfather, Sir Thomas Hope, his Majesty's Advocate, in the years 1602, 1603, 1604; all written with his own hand, and these two manuscripts, with a lesser one of some few practiques, cited by his son Kerse in his great collection *Practiqua observatio patris*, are given by me to the worthy Faculty of Advocates to be preserved in memory of the author, and as a mark of my respect and esteem to the noble faculty. Edinburgh, 26th Jan. 1702. A. HOPE."—MSS. Advocates Library, 6. 2. 9.

² Nisbet, Heraldry, i. 218, Append. 91; Douglas' Baronage, 58; Coltness Papers, 16.

Church of Scotland. In this he could not hope to succeed so long as the independence of the General Assembly was preserved. In 1603 he had prorogued the Assembly. In 1604 it was again put off. In 1605 an Assembly was held at Aberdeen in July. Few ministers were present, owing to the bad state of the weather, but a Moderator, or president, was chosen, and those present were about to commence business, when a letter from the Privy Council was read, desiring the Assembly to disperse and not meet again without authority from the King. It was agreed to adjourn till September, but the right of his Majesty to permit or forbid meetings of the Supreme Court of the Church was denied. Soon after this, Forbes, the Moderator, Welsh, a leader of the clergy, and other ministers who had been at Aberdeen, were arrested and confined in Blackness Castle. This took place at the end of July. In August the Privy Council issued a proclamation forbidding the Assembly to meet in September. The imprisoned ministers and their friends replied by issuing statements maintaining the lawfulness of holding the Assembly.

In October, a summons, at the instance of the Lord Advocate, was served upon the imprisoned ministers, calling them to appear before the Privy Council, to answer for their conduct in the matter of the Aberdeen Assembly. The ministers answered this summons by a "Supplication," in which they declared that if they had broken any civil law they were ready to abide the judgment of a Civil Court, but that the lawfulness of a General Assembly was a spiritual matter, which the Church Courts alone could decide. The Lord Advocate urged them to put in answers to his summons. They did so, but, at the same time, signed a document, in which they formally declined the judgment of the Privy Council as incompetent. A few days after the "declinature" had been signed, the Gunpowder Plot was discovered in

England. When the news reached Scotland it was thought that the King's anger would be turned from the Presbyterians of Scotland to the Papists of England. But James declared that "the Papists were seeking his life indeed, but the ministers were seeking his crown, dearer to him than his life;" and orders were sent down to Scotland, directing Lord Advocate Hamilton to indict the ministers on a charge of treason in declining the jurisdiction of the Privy Council.

It was decided that the trial should take place at Linlithgow, which was only two miles from the Castle of Blackness, in which the accused were confined. The Privy Council privately arranged that the 10th of January should be the day of trial. But this was kept a secret; and a report was spread that certain Scottish noblemen were accused of complicity in the Gunpowder Plot, and that the Council was to meet at Linlithgow to consider their case.¹

The object which the Council had in view in concealing the day of trial was to prevent the prisoners having time to make arrangements for defending themselves. But the ministers, by some means, received information of the intentions of Government, and sent a messenger to Edinburgh with instructions to retain counsel for their defence. Hope was one of the counsel retained, the others being Thomas Craig, William Oliphant, and Thomas Gray. It is said that Hope had never had a criminal case before. This is doubtful; but he was at this time very little known at the bar, and was not, therefore, expected to take a leading part in the defence.

The advocates were requested to find out if the trial was really to take place on the 10th of January, and if it was, to go to Blackness a day or two before. But no information could be obtained as to the day of trial. The Privy Council maintained complete silence; and the Justice-Depute him-

¹ Forbes, Records, 453.

self declared that he had received no instructions to be present at the meeting at Linlithgow.

On the 8th of January the four counsel went to Blackness, although they had, as yet, no certain information that the trial was fixed for the 10th. Before they left Edinburgh the Earl of Dunbar saw them, and suggested that they should advise their clients to acknowledge that they were in the wrong, and "submit themselves to the King's will and pleasure." The advocates did so; but the ministers defended their position, and explained the great danger to the liberty of the Church which they thought would follow any submission on their part. The advocates pointed out the personal risk which the accused were running, and seem also, though satisfied of the justice of their clients' cause, to have been of opinion that it might be wiser for them, in the interests of the Church itself, to retrace their steps. After a long and earnest consultation, Hope and the three senior counsel returned to Linlithgow, promising that, if their services were required, they would appear and plead.¹ Next morning the ministers sent a message to their counsel, desiring them to inform the Earl of Dunbar that they were resolved to stand by the declinature. At the same time they would like, they said, to see Mr. Thomas Hope. Hope at once went to Blackness, and spent the whole day with the prisoners, whom he strongly advised to throw themselves on the King's mercy. That they firmly refused to do. This consultation took place on the 9th of January. In the evening Hope returned to Linlithgow, where, on the following day, an event took place which was the beginning of his long and splendid career.

Early on the morning of the 10th the imprisoned ministers were roused from sleep by the sound of a trumpet. A guard of soldiers had come from Linlithgow, and the

¹ Forbes, Records, 454.

officer in command informed them that they were to be led before the Privy Council, which was to sit at daybreak. The sun was rising as they entered Linlithgow, where all was bustle and excitement. A full meeting of the Privy Council was expected. The ministers were received by the Countess of Linlithgow, who gave them breakfast, and took them to a room which had been prepared for their reception.¹ Here they were joined by a number of their friends, and, in the course of the morning, members of the Privy Council, from time to time, came in and tried to induce them to submit and plead guilty. Even Hart, the Justice-Depute, and three judges of the Court of Session, came to argue with them. At last Lord Advocate Hamilton himself appeared, told them, apparently for the first time, that they were to be charged with treason, and declared that they would certainly be convicted.² With the Lord Advocate came Oliphant and Craig, two of the counsel for the defence. The Lord Chancellor had persuaded them to betray their clients, and break their promise to plead against the Crown. Of this, however, the ministers were not yet aware.

The forenoon was spent in interviews and negotiations between the ministers and the Privy Council; but, in the end, the ministers declared that "they saw the Lord had called them that day to give a testimony to the liberty of the kingdom of Jesus Christ, and to stand for his Crown, and therefore were not afraid, but glad." As soon as the Council heard of this they sent the lieutenant of the guard to say that the Justice-Depute and the Council were waiting. The prisoners were brought in, and the indictment was read by the Justice-Clerk-Depute.

The Justice-Depute asked the prisoners what counsel they wished to defend them, and the four advocates who had been

¹ Calderwood (Wod. ed.), vi. 375.

² The Proceedings against the Ministers in Blackness, Penned by Themselves; Calderwood (Wod. ed.), vi. 452.

retained were named. Hope and Gray at once appeared, and stated that they supposed Oliphant and Craig would attend, if sent for, as they had come to Linlithgow on purpose to lead the defence. A messenger was sent to them, and the Court waited for their answer. They refused to come. Hope then moved the Court to order them to appear, as Craig had a general retainer to plead for the Church, and Oliphant had promised to plead in this case; but the Justice-Depute replied that he would not compel any counsel to plead. Hope and Gray then undertook the defence themselves.¹

"The substance," says Calderwood, "of Mr. Thomas Hamiltoun, the King's Advocat, his accusation, was concluded in this syllogisme:—Whosoever, in whatsoever cause, declines the King and the Counsell's judicature, incurs the guiltiness and pain of treason. But these upon the pannel have declined the King and Counsell's judicature: *Ergo*, they have incurred the guiltiness and pain of treason." Before a jury could be impanelled to try the facts of the case, it was necessary that a judgment should be pronounced, finding the indictment relevant in point of law. The point at issue is one which is well known to all students of Scottish history. In 1584 certain Acts, known as the Black Acts, were passed. One of these Statutes ordained that the King and Privy Council should be supreme judges in all cases and over all persons, and that whoever declined the jurisdiction of the King and Council was guilty of treason.² This Act was aimed at the Presbyterians. But the people hated Episcopacy, and, in 1592, when the popular party gained the ascendancy, an Act was passed which established the Presbyterian form of church-government,

¹ Forbes, Records, 464, etc.; Calderwood (Wod. ed.), vi. 377, etc. By law, Oliphant and Gray should have been compelled to plead, Stat. 1587, cap. 91. Spotiswoode represents the two "principals" (i.e. senior counsel) as refusing to plead for the ministers "because of their obstinacy."—Hist. 489, 490.

² Stat. 1584, cap. 129.

and repealed most of the Statutes of 1584. In particular, it was declared that the Act of 1584, which conferred supreme jurisdiction on the King and Council, should not be, in any way, prejudicial to the spiritual jurisdiction of the Church.¹ The Lord Advocate now relied on the Act of 1584. Hope, on the other hand, maintained that, if the Act of 1584 was properly construed, it could not be treasonable, in every case, to decline the jurisdiction of the Privy Council, because it was lawful, in a criminal case, to insist on having it tried in the Justice Court, as it was likewise lawful, in a civil case, to insist on having it tried in the Court of Session. He also maintained that, in 1592, the Act of 1584 had been abrogated in so far as concerned matters of church discipline, under which, he argued, fell all questions as to the lawfulness or unlawfulness of a General Assembly.

On these questions of law there was a long and keen debate. "Mr. Thomas Hope," says Calderwood, "thought it meete to putt all his reasons in writt, *ad futuram rei memoriam*; and there instantlie and off hand dytted his reasouns to the two clerks there present. The King's Advocat did the like. There was sharp reasoning on both sides. Notwithstanding of the clerks' swift writting, two houres were spent before they made an end. Mr. Thomas Hope had never pleaded before the justice clerk before; yitt nothing was wanting in him in that actioun, that was to be found in the most expert lawyer. His pleading that day procured him great estimatioun and manie clients; and his credite has ever growne sensyne, till now, that he is become the King's Advocat. Mr. Thomas Gray was a man of sincere affectioun, and of good skill in the lawes, but not so good utterance."

But the result of the debate was a foregone conclusion. The Justice-Depute, and the Privy Councillors who acted as

¹ Stat. 1592, cap. 116.

his assessors, held that the Lord Advocate's argument was sound in law, and a jury was chosen.

The proceedings now lost all semblance of fairness. The presiding judge and his assessors were as eager as the prosecutor for a conviction. The Lord Advocate addressed the jury in menacing tones. "The judges," he said, "have approved my proposition that it is treason to decline the jurisdiction of the Privy Council. All you have to say is whether the prisoners have declined it. Here is their declinature written by themselves. If you do not convict, you shall yourselves be tried by an Assize of Error, and your lives and fortunes will be at the mercy of the King." Hope, in an eloquent speech, told the jury that they were judges of the law as well as of the fact. "The Lord Advocate," he said, "has declared that you are only to find that, in point of fact, the jurisdiction of the Privy Council has been declined. I, on the contrary, maintain that you must consider whether this declinature is such a declinature as falls within the compass of the law."¹ He ended by calling on them "to fear the righteous God, and Christ the Great Judge," and "to bear in mind the services which the prisoners, for many years, had rendered to the Church and to the country."²

Hope and two of the prisoners, who also spoke, were heard with impatience. The jury were told to withdraw and consider their verdict. The Justice-Clerk was sent with them, in violation of the law.³ For six hours they discussed the case. At first they were divided in opinion, but one juror argued so stoutly for the prisoners that a majority made up their minds to acquit. On this, another juror, one of several who had secretly promised to the Lord

¹ Forbes, Records, 479.

² Calderwood (Wod. ed.), vi. 381. In one MS. what purports to be a verbatim report of Hope's speech is given. Forbes, Records, 477, etc.

³ Stat. 1587, cap. 92.

Advocate that they would convict, left the jury-room just as the verdict was about to be decided by a vote, and told the Privy Council that he feared there would be an acquittal. At this the Councillors took alarm. The jurymen were threatened or cajoled, until a majority had been talked over, and a verdict was returned, finding the prisoners guilty.¹ Sentence was delayed till the King's pleasure was known. On hearing the result of the trial, James decided that a sentence of perpetual banishment should be pronounced; and, soon after, the six ministers said farewell, on the shore at Leith, to their wives, children, and friends, and left Scotland for ever.²

Thus Hope lost his first important case; but from that day he rose rapidly, and was soon ranked among the leaders of the bar. Only two years after the trial of the six ministers, we find Lord Advocate Hamilton speaking of him as one of "the most learned and best experienced" advocates at the bar of Scotland. This was on an occasion when the Privy Council wished to have his opinion on a point of criminal law, along with that of the advocates Oliphant, Russell, and King; but all four were engaged for the defence. The case was the trial of Margaret Hartsyde, who was accused of stealing the Queen's jewels. It was a *cause célèbre*, the real reason of the prosecution being, according to the gossip of the Court, that she had revealed some of the Queen's secrets to the King, "wich," says Balfour, "a wysse chalmbermaide wold not haue done." Although defended by the best men at the bar, the maid was found guilty, declared infamous, and banished to the Orkneys.³

¹ By a majority of nine to six. Forbes, Records, 493, 494; Calderwood (Wod. ed.), vi. 367, 368.

² Calderwood (Wod. ed.), vi. 590.

³ Melros Papers, i. 50, 344; Balfour, Annals, ii. 26; Pitcairn, Crim. Trials, ii. 544-557. This trial took place on the 31st of May 1608. The declaration of infamy was afterwards recalled.

It is unnecessary to trace Hope's career at the bar, where he enjoyed a lucrative practice during the remainder of the reign of James the Sixth.

It was with the reign of Charles the First that his public life began. Charles came to the throne with two distinct objects in view, to revoke the grants of Church property given by his father to the laity, and to compel the Church to use a liturgy. James had given to the nobility almost all the Church property which had been taken from the Popish clergy. Charles now resolved to revoke these gifts. It was Hope who, in 1625, prepared the famous deed of revocation which recalled all erections of Church lands, teinds, and patronages, and which embraced all deeds executed by the King during his minority. This revocation was proclaimed by heralds at the Market Cross of Edinburgh, and from that day Charles was unpopular with the nobles of Scotland. So vigorous was the opposition to what had been done, that the King speedily consented to restrict the revocation to such grants as had been made to the direct prejudice of the Crown.¹

Lord Advocate Oliphant was now an old man; and it was thought proper that he should have a colleague. Hope was at the top of the bar. He had prepared the deed of revocation, and it was decided that he should be joint Advocate with Oliphant. According to Burnet, he received his appointment "upon his undertaking to bring all the Church lands back to the Crown."²

Hope was appointed Lord Advocate, as colleague to Sir William Oliphant, on the 29th of May 1626.³ Soon after receiving his commission, he addressed a Latin poem, of about one hundred and twenty hexameter lines, to Charles,

¹ Connell on Tithes, Append. xxxviii.

² History of his Own Times, i. 30.

³ Regist. Secreti Sigilli, xcvi. 444.

in which he extols the greatness and virtues of his Majesty.¹ But more serious work was at hand. Burnet says that Hope proceeded so slowly with the recovery of the Church lands "that it was believed he acted in concert with the party that opposed it." But it was he who advised the action which was instituted, in August 1626, for the purpose of setting aside, as null and void, the various grants of which Charles complained. This famous summons of reduction was "at the instance of us, and at the instance of our well-beloved counsellor, Sir William Oliphant of Newton, Knight, and at the instance of Thomas Hope of Craighall, our Advocate, for our interest and title."² In the terse language in which it is expressed, and in its concise yet exhaustive framing, we can trace the hand of Hope. But the process was not followed out. The Earls of Rothes and Linlithgow were sent to London, in order to lay before the King a petition stating the grievances of the nobles who were affected by the summons. At Stamford they were met by a command to stop their journey till further orders.³ The petition was forwarded to the Secretary of State for Scotland, Sir William Alexander of Menstrie, better known as the Earl of Stirling, who laid it before the King. When he saw it Charles was angry, but was persuaded to see Rothes and Linlithgow. "At their first audience," says Forbes, "the King said (alluding to their youth) that they had been treated like so many young does, whom the old ones, finding themselves hotly pursued, and in hazard of being taken, cunningly expose to the hunter's fury, to save their own carcases." The task of seriously discussing the subject was left to the Secretary of State, and the result of his negotiations

¹ *Carmen Sæculare Thomæ Hopæi a Craighall, alterius ex Regiis in Scotia Advocatis*, 1626.

² The summons of reduction-improbation of August 1626 is printed at length in Connell on Tithes, Append. xxxix.

³ Forbes on Tithes, 261.

was that the summons was abandoned, and that, in January 1627, a Commission was appointed to consider the whole subject of the valuations of teinds and the stipends of the clergy, and report to the King.¹ This Commission, of which Hope and Oliphant were members, sat during the summer of 1627, and decided that all superiorities of erection should be resigned into the King's hands, and that the question of compensation should be left to his Majesty. After this came the four submissions of the lords of erection and land-owners, of the clergy, of the burghs, and of the tacksmen, followed by the four decreets-arbitral of 2d September 1629, which laid the foundation of our present system.²

Throughout the whole of these proceedings Hope, who was made a Baronet of Nova Scotia in February 1628, took the leading part on behalf of the Crown. He was present, as a member, at the meetings of the Commission, and, when necessary, protested, as Advocate for the King, against such proposals as he thought prejudicial to the interests of the Crown.³

In November 1628 the judges of the Court of Session passed an Act of Sederunt regarding the privileges of the Lord Advocate. Henry Lauder, Advocate to James v., had been admitted to sit with the judges in 1538.⁴ In May 1628 the King wrote to the Lord Chaneellor, saying that, though Lord Advocate Oliphant had been removed from his place on the bench in terms of the rule that no Officer of State could be a judge, yet it was his will that nothing should be done to prejudice the office of Lord Advocate, and, "seeing that we are certainly informet by Sir Thomas Hope, now our advocat, that Maister Henry Lauder, advocat for the tyme to our umquhile great grandfather King James the Fyft, who wes the first instituter of that Colledge of Justice,

¹ Connell, Append. xl.

² Act. Parl. Scot. v. 189-196, 197-207.

³ Minutes of the Commission of January 1627.

⁴ *Supra*, p. 21.

befoir he wes admittit upoun the same, had place to sitt within the Inner-house, to heir all causes reasoned and voted be the Lordis, except these wherein he wes an actual pleader himself," therefore the Lord Advocate was now to be admitted to sit with the judges. The judges were jealous, and did not at once obey. The King wrote a second time, commanding them to admit Hope, "as we conceave no prejudice can arryse heirby to you." In obedience to this letter, the judges, on the 19th of November 1628, administered an oath of secrecy to the Lord Advocate, and admitted him to sit with them, and hear their consultations, except in those cases in which he was himself counsel. A special place was appointed for him, "without thair awin benches."¹

But Hope's sphere of action lay in Parliament rather than in the Law Courts. On the 15th of September 1628 Parliament was opened by Commission, when the Lord Advocate produced a letter from the King proroguing the meeting of the Estates till the 15th of April 1629. From the 15th of April 1629 till the 18th of June 1633 the Parliament of Scotland was prorogued by a series of royal letters, which Hope produced at each successive meeting of the Estates.

The meeting of the Estates in June 1633 illustrates the procedure of the Scottish Parliament on the eve of those extensive encroachments on the royal prerogative, which were brought about by the arbitrary policy of Charles the First. The sittings of the Parliament occupied just four days. On the first day, the 18th of June, the proceedings began by the Lord Advocate producing the King's letter authorising the meeting of the Estates. On the second day, the members produced their commissions, and were directed to attend the King, on the following morning, from the Palace of Holyrood to the Parliament House. Next day,

¹ Act of Sederunt, 19th Nov. 1628.

the "Riding of Parliament" took place, when the peers, prelates, and commoners accompanied the King from his Palace in solemn procession. The Committee of Articles was chosen. First the temporal peers elected the spiritual peers who were to act on the Articles. Then the spiritual peers elected the temporal peers. By the members so chosen the commoners were elected. Thus the choice of the Committee of Articles was almost entirely in the hands of the prelates. The names of the Committee of Articles were read to the King, who then named his Officers of State, and appointed the Lord High Chancellor to preside over the Committee. Then the King took his seat on the throne. The members of the Estates assembled in their places, and the names of the Lords of the Articles were announced to the House. Thereafter his Majesty and the Estates directed the Lords of the Articles to meet in the inner house of the Tolbooth, at ten each morning, "to treat and deliberate upon such acts, articles, petitions, ratifications, and others, as shall be proposed in Articles to be concluded in Parliament," and ordained the whole Estates to wait in the town of Edinburgh till the end of the Parliament. In obedience to this order, the Lords of the Articles and the Officers of State met in the Tolbooth daily from the 20th to the 28th of June. On the 28th, the fourth sitting of the Estates took place. On that day the whole Estates re-assembled. The Acts prepared by the Lords of the Articles were read, voted on by the House, carried to the throne by the Lord Clerk Register, and touched with the sceptre. In all, one hundred and sixty-eight Acts of Parliament were thus passed in one day.¹

¹ Act. Parl. Scot. v. 6-161. "The way of the Scots Parliament is, when any law is voted and ingrossed, when the Commissioner calls for it, the Chancellor subscribes upon the Act his name, adding Cancellar, and the initial letters of the words *In presentia dominorum parliamenti*. Then it is carried to the throne: and the Commissioner, the title being read to him by the Lord Register, touches it with the sceptre, which is the symbol of the royal assent."—Marchmont Papers, iii. 324.

Before the Estates rose a dispute took place as to the precedence of the Lord Advocate. Sir James Gallaway, Master of Requests, protested that Hope should not be ranked before him on the roll of Officers of State, and maintained that his office was more ancient than that of the Advocate, and had generally been allowed precedence. The Lord Advocate, in reply, claimed to be ranked before the Master of Requests, "in respect of his ancient precedency of place in all Parliaments, Conventions, and Councils, and his Majesty's ranking of the Officers of State in this present Parliament; wherein he, by his Majesty's own voice, is ranked before the Master of Requests." The protests were recorded, and with that the squabble ended for the time.¹

Though the Acts prepared by the Lords of the Articles, in the session of 1633, became law, they did not pass without hostile criticism. "For the first time," it has been said, "in the history of the Scots Estates, we have distinct vestiges of a Constitutional Parliamentary opposition."² The decrees-arbitral of 1629 were ratified.³ But the King's revocation, though intensely unpopular, had been acquiesced in for some time; and the Acts to which opposition was chiefly made were two relating to the Church. The first of these renewed and confirmed two Statutes of James the Sixth, one of which declared the King to be supreme over all causes and persons, and the other of which gave the King power to prescribe the apparel of Churchmen. The second was a ratification of all the Acts by which Episcopacy was established in Scotland.⁴ Foremost in leading the Opposition were John Earl of Rothes, that versatile politician and jovial man of pleasure who became so prominent among the Covenanters, and John Elphinstone, Lord Balmerino, whose father had been convicted of treason in the reign of

¹ Act. Parl. Scot. v. 161.

² Hill Burton, *Hist. Scot.* vi. 371.

³ Stat. 1633, cap. 14, 17, 19.

⁴ Stat. 1633, cap. 3, 4.

James the Sixth, and who was soon to suffer the same fate himself.

Not only were the provisions of the obnoxious Statutes disliked, but there were circumstances connected with their passing which caused much discontent. When the division was going on, his Majesty made a note, with his own hand, of each member's vote, and did not hesitate to express his resentment towards those who voted against his wishes. This "unseemly act" was observed, and deeply resented.¹ When the voting was over another untoward incident took place. It was the duty of the Lord Clerk Register to count the votes and announce the result of the division. He did so, and declared that the Opposition was defeated. The House was instantly filled with murmurs of dissent. Rothes rose, and challenged the statement of the Lord Clerk Register. The King, however, at once silenced him by saying that he was making a charge of high treason against the Lord Clerk Register, and if he made such a charge, and failed to prove it, he would be himself guilty of treason. Rothes was too prudent to say more, and the vote was allowed to stand without further challenge. The King was incensed at the conduct of the Opposition. He refused to speak to Rothes, and did not forgive him for years. Balmerino he never forgave, and on him the royal vengeance fell speedily.²

A petition to the King was now prepared, in which the grievances of a number of those who had sat in the late Parliament were set forth in a very calm and reasonable manner.³ This petition was not presented to the King. The real author of the document was William Haig, a notary; but Balmerino possessed a copy, which he had revised and corrected with his own hand, his corrections

¹ Balfour, *Annals*, ii. 200.

² Rothes, *Relation of Affairs*, Append. 222.

³ *State Trials*, iii. 604-608.

being made with the view of rendering the paper even more submissive than it already was. This copy he lent to John Dunmure, a notary of Dundee, who showed it to Hay of Naughton. Hay induced Dunmure to let him have it, and went straight to the Archbishop of St. Andrews. Spotiswoode at once went to London, and laid it before the King. It was believed at Court that printed copies of the petition were being privately circulated through the country, and that it was the intention of the petitioners to make it public when a sufficient number of signatures had been obtained.¹

Balmerino was called upon for an explanation; and Haig at once fled to Holland, whence he wrote several letters, in which he admitted that he was the writer of the petition.² Balmerino was, however, imprisoned in the Castle of Edinburgh, and the Lord Advocate was directed to prepare a summons for leasing-making, which was served upon the accused on the 14th of November 1634.³

The Lord Advocate sent a copy of the summons which he had prepared to the King. It proceeded on two Statutes of James the Sixth. One of these Statutes ordained that all should "content themselves in quietness and dutiful obedience," and that none should dare, on pain of death, even privately to censure the King's actions, or "misconstrue his proceedings;" the other ratified and confirmed the various Statutes against leasing-making.⁴ Hope, in this summons, painted the prerogative of the King in strong colours. The King, he said, "ought to be revered, and honoured, and feared, as God's lieutenant on earth;" and

¹ Rushworth, *Hist. Collections*, ii. 281.

² *State Trials*, iii. 699-702.

³ *Ibid.* 604.

⁴ Stat. 1585, cap. 10; Stat. 1594, cap. 209. "Leasing-making" may be defined as making mischief between the King and his subjects, or as "verbal sedition." Hallam speaks of this crime as the "mystery of iniquity" in the law of Scotland.

again, "All subjects are bound and tied in conscience to content themselves in humble submission to obey and reverence the person, laws, and authority of their supreme Sovereign." The petition is furiously attacked. It is "a most scandalous, reproachful, odious, and seditious libel," which blames the King for refusing to receive from his subjects reasons of dissent from his proposed measures; "and the libeller, not content with these reproaches, most villainously and despitefully belched and vomited forth against our sacred person, proceeds to a most fearful and dangerous undermining of our honour, credit, and greatest happiness, in affirming that there is now a general fear of some innovation intended in essential points of religion: albeit (blessed be God) it be certainly known, to all our good subjects, that we are, and in all our doings have shown ourselves to be, a most devout and religious prince, hating and abhorring in heart and affection all papistical superstitions and idolatry." The author of the petition is spoken of as writing "out of a devilish humour." He has a "furious and curious brain." He is "the unhappy penner of that cursed libel." He has "a nipping and cheeking style." He is so "pert and impudent in his devilish style that he spares not the name of our ever-glorious dearest father, King James of blessed memory." He is a "venomous wasp." Finally, good subjects ought "to crush this cockatrice in the egg, and to abhor it as a pestilential clout."

The charges clothed in this mass of abuse were mainly three: sharing in the authorship of the petition by making corrections on it; concealing the author's name; and not apprehending the author and giving him up to justice. Sir Thomas Hamilton, in the heyday of royal favour, could not have prepared a summons more replete with fulsome eulogy of the King, or more savage against his enemies, than

the summons a copy of which Sir Thomas Hope despatched to Charles. But he had strong reasons for his apparent keenness in this prosecution. At the time of his appointment as Lord Advocate his sympathy with the Presbyterians was well known, and on that account his promotion had caused some surprise, although he was, without doubt, the leader of the bar. He was now nervously afraid that Balmerino's trial would be made an occasion for discrediting him with the King. It was about this time that he began to keep his Diary.¹ In it, from December 1634 till the trial was over, we find constant allusions to the progress of the great political case; and it appears that during the whole period of the prosecution he kept the King acquainted with what was going on. One of his sons was at this time at Court, and in a letter written to him, a few days after the trial began, the Lord Advocate enclosed "a note touching the criminal process, and of the plot for laying the blame on me if it miscarry."² He made, in consequence of the dangers which menaced him, extraordinary exertions to obtain a conviction. On the 3d of December 1634 the trial began. The popular feeling was strongly in favour of the accused. The doors of the Court-house were surrounded by crowds of citizens, who abused and threatened the judges as they went in.³ Lord Errol presided as Justice-General; Spotiswoode, President of the Court of Session, Lord Clerk Register Hay, and Sir James Learmonth, a judge of the Court of Session, acted as assessors to the Justice-General. The Lord Advocate appeared alone for the Crown, and produced the King's letter commanding him to prosecute. There was a long series of learned discussions on points of law. The prisoner was defended by four of the ablest men at the bar of Scotland, the youngest of whom was

¹ Diary of the Public Correspondence of Sir Thomas Hope of Craighall (Bannatyne Club, 1843).

² Hope's Diary, 8th December 1634.

³ Monteth, History of the Troubles, 88.

John Nisbet, afterwards Lord Advocate to Charles the Second, and a judge of the Court of Session by the title of Lord Dirleton. These discussions lasted from the 3d till the 20th of December. Each day Balmerino was conducted, by an armed escort, from the Castle to the Court in the morning, and back again at night. Day after day his advocates poured forth floods of eloquence for the purpose of showing that the summons was not relevant, and were answered, with equal eloquence, by the Lord Advocate; but, on the 20th of December, the judges repelled all the objections.¹ It was not, however, till the following spring that the case was sent to a jury. Balmerino was, by one vote, found guilty of "hearing of the said infamous libel, concealing, and not revealing of the said Mr. William Haig, affirmed by him to be the author thereof."² He was found not guilty on the other charges. Sentence of death was at once pronounced, but execution was delayed till the King's pleasure was known. At this delay the prelates, says Balfour, "raged like a tempestuous sea." But the King was more merciful than his Bishops, and said he would never take the life of any man, "much less a nobleman's," when he had been convicted by only one vote. Balmerino was pardoned after some time.

It is undoubted that the prosecution of Balmerino was one of the chief causes which helped to ruin Charles. "During the whole trial," says Laing, "the people discovered extreme agitation. They assembled daily, in opposition to the efforts of their magistrates, in tumultuous crowds; they prayed aloud, and in the streets, for the preservation of Balmerino; applauded the exertions of his friends, and showered imprecations on the heads of his enemies."³ Hope not only conducted the prosecution, but

¹ State Trials, iii. 689.

² State Trials, iii. 712; Balfour, Annals, ii. 219.

³ Laing, Hist. Scot. iii. 111, 112.

conducted it with the greatest zeal and ability; and it is a remarkable proof of his influence that there is no reason to think that the popular party lost their confidence in him at this time. He was, it seems, as much trusted when the thought of Balmerino's wrongs was rankling in the bosoms of his friends, as when he was known, not as the King's Advocate, but as the champion of the six ministers.

But transactions were at hand which called for even greater tact than those through which Hope had just passed. The Bishops had persuaded Charles to introduce Laud's Liturgy into Scotland. They had deliberately deceived the King as to the feeling of the people on this subject. Had the Scottish clergy been consulted as a body, Charles might never have tried to force the Service-book upon the country. But the clergy, as a body, were ignored, and the voice of the prelates was alone listened to.¹ At the present day Scotsmen always know more about England than Englishmen know about Scotland. So was it in the seventeenth century. The King and his English advisers, perfectly ignorant of what was going on in Scotland, believed the false statements made by the Scottish Bishops, and expected the Liturgy to be received, not only without opposition, but even with applause.² The Privy Council of Scotland was also to blame. On the 20th of December 1636, in obedience to the wishes of the King, they passed an Act commanding the use of the Service-book, without warning his Majesty of the opposition which they must have known awaited it. Hope was present at the meeting of Council at which this was done.³ But Traquair, the Lord High Treasurer, was of opinion that the Lord Advocate was not to be relied on. He had a private quarrel with Hope, who had recently differed from him about

¹ Clarendon, *Hist.* i. 86.

² Monteth, *History of the Troubles*, 19.

³ Baillie, *Letters and Journals*, i. Append. 440.

a piece of unimportant business which came before the Council. On that occasion, Traquair, a man of violent temper, who could not brook opposition, had abused the Lord Advocate, threatened to have him dismissed, said Sir Lewis Stewart should be put in his place, and broken up the meeting because he could not have his own way.¹ From that day he had intrigued against Hope, who was so perfectly aware of what was going on that we find him writing to the Earl of Roxburghe, who was in London, asking him to find out the truth about "a motion made to his Majesty by Earl Traquair for a second or successor to me."² The intrigue did not succeed, and the Lord Advocate remained in office; but the quarrel between him and Traquair continued until a meeting took place at the Lord Advocate's house, when Traquair promised that he would not molest Hope in future.

The Act of Council commanding the use of the Service-book directed that every parish church should be provided with two copies by Easter 1637, and that the reading of the book should commence at that time. But a cry was raised that the Bishops and Laud had formed a league to bring in the Mass-book, and delay was proposed.³ The prelates were divided into two parties. For a time it seemed as if moderate counsels would prevail; but Laud sent down by Traquair, a warrant from the King directing the immediate use of the Service-book. The aggressive party among the prelates, mainly consisting of young men, were delighted. "But the wise old bishops," says Guthrie, "were of another mind, and thought more than they spake; however, now they had nothing left them, but either to do or die."

What happened is well known. On Sunday the 23d of July, St. Giles' Church at Edinburgh was crowded. The

¹ Baillie, Letters and Journals, i. 11.

² Hope's Diary, 27th Dec. 1636.

³ Bishop Guthrie, Memoirs, 17.

Archbishops, the Bishops, the Lords of Session, the Magistrates of the city, some of the Privy Councillors, and a vast multitude of all classes, had come to hear the new Service-book read. The Dean opened the book. In a moment the church was in an uproar. The Bishop of Edinburgh went into the pulpit, and tried to restore order. A stool was thrown at his head. It was thought that the lives of the prelates were in danger; and the rioters, many of whom were servant-girls, were turned out. The Dean then read the Service-book, while the people outside, shouting "A pope! false Antichrist! beastly bellygod! pull him down!" pitched stones into the church through the windows.

A meeting of the Privy Council was held after morning service, at which arrangements were made for guarding the church during the afternoon, when the Liturgy was again used. But it was noticed that some of the Officers of State, who were usually in church on Sundays, had not been present on this occasion. This led the Bishops to imagine that the disturbance which had taken place was the result of a deep-laid scheme on the part of the leaders of the Presbyterian party, acting in concert with the Lord Advocate. The only reference to the riot in Hope's Diary is: "This day the Service-book begoud to be read within the Kirks of Edinburgh, and wes interruptit be the women, etc."¹ But he was probably one of those who did not go to St. Giles' that day. This fact, taken along with his strong Presbyterianism, may have led to the charge which Bishop Guthrie brings against him, of having, along with Balmerino, been cognisant of what was to take place. Guthrie's story is that Henderson, a leading minister, came to Edinburgh with two friends, and consulted the Lord Advocate and Balmerino as to a plot which they were hatching for disturbing the reading of the Service-book. Hope and Bal-

¹ Hope's Diary, 23d July 1637.

merino, he says, gave their approval, and the three ministers "did afterwards meet at the house of Nicholas Balfour in the Cowgate, with Nicholas, Eupham Henderson, Bethia and Elspa Craig, and several other matrons, and recommended to them, that they and their adherents might give the first affront to the book, assuring them that men should afterwards take the business out of their hands."¹ But in support of this story there is not the slightest evidence.

The use of the Service-book was now suspended until the King should make known his will concerning it. The Privy Council was the scene of contention. The Lord Advocate openly declared against the Liturgy, and explained his acquiescence in the Act of Council directing it to be used, by saying "that by his consent to the Liturgy he meant, not an active, but a passive obedience, and that he had no thoughts of accepting it, but of condemning it."² Rothés, Cassillis, Eglinton, Home, Lothian, and Wemyss now joined the party of Loudoun and Balmerino in opposing the Liturgy. Hope's position was delicate and peculiar. He was trusted by the Supplicants, as the members of the popular party were called, and yet he was the King's Advocate. According to Guthrie, "the oracle whom the Supplicants consulted anent the legality of their proceedings, was Sir Thomas Hope (his Majesty's Advocate) who, though he professed to have no hand in the business (being the King's servant), yet in the meantime laid down the grounds and ways whereby they were to proceed." This statement may not be quite accurate; yet there can be no doubt that Hope now stood in the singular position of being the ablest of the King's Ministers, and at the same time the trusted friend of those who were in deadly opposition to the King's policy. His conduct was reported to Charles, who,

¹ Bishop Guthrie, *Memoirs*, 20.

² Monteth, *History of the Troubles*, 20.

however, would not part with him, and he remained in office.

At the end of July the Law Courts rose, and during the vacation Edinburgh was almost empty. But in October the city was crowded with persons of all ranks, waiting for the King's answer to the petition against the Liturgy. The Privy Council, becoming alarmed, issued a proclamation directing all strangers to leave the city within twenty-four hours, and removing the sittings of the Court of Session to Linlithgow. The proclamation of the Council was not obeyed. The Supplicants remained in town, but kept within doors, their leaders being, according to Guthrie, "all that while with Sir Thomas Hope, getting their lessons." To the movement against the Liturgy was now added a movement against the Bishops; and the Presbyterians left Edinburgh, having agreed to return again on the 15th of November, armed with petitions against the Bishops as well as the Service-book. On the appointed day the city was again full, and the Bishops were alarmed to find that Montrose had joined the Presbyterians. "They thought it time," says Guthrie, "to prepare for a storm when he was engaged." The Privy Council feared that the riots of the previous summer would be renewed, and represented to the Supplicants the dangers which might arise if they met in great numbers. To guard against the danger of disturbances, it was proposed that the Supplicants should be divided into Nobles, Lesser Barons, Burgesses, and Clergy, that four representatives should be chosen from each of these classes, and that a permanent committee of sixteen should thus be formed to act on behalf of the whole body. The Supplicants maintained that they were entitled to convene for the purpose of taking means to defend their opinions, if the King's answer to the petition against the Liturgy was not satisfactory. Traquair objected to this, but was overruled

by Lord Advocate Hope, who declared that, in point of constitutional law, they might lawfully meet. The well-known Tables thus took their place in history.¹

Soon after this Hope became an active supporter of the Supplicants. The Tables demanded the removal of the Bishops from the Privy Council. The Council at this time sat at Dalkeith; and, at a meeting held there on the 19th of December, the position of parties in the Scottish Cabinet was more clearly defined than it had previously been. On the important point of the Bishops, Traquair, Treasurer-Depute Carmichael, and Justice-Clerk Hamilton, agreed with the Lord Advocate in supporting the Supplicants. The Earl of Roxburghe, Lord Privy Seal, though a personal friend and warm admirer of the Lord Advocate, would not commit himself. Sir John Hay, the Lord Clerk Register, who, shortly before, had been made Provost of Edinburgh against the wishes of the citizens, was the only Officer of State who supported the Bishops.²

Traquair was now sent to London by the Council, in spite of the opposition of Sir John Hay and the Bishops, to inform Charles of the state of affairs in Scotland, and receive his answer on the subject of the Service-book. He left Scotland on the 21st of December, and returned about the end of February 1638. A few days before the Lord Treasurer's return the judges and the bar were commanded to go to Stirling, where the Court of Session had been in the habit of sitting since the riots in Edinburgh, and commence business. The judges went; but the leading advocates remained in Edinburgh, to await the King's decision on the question of the Church. The Lord Advocate also remained in Edinburgh. Traquair returned from London, with instructions to make proclamation at Stirling,

¹ Baillie, *Letters and Journals*, i. 40; Hill Burton, *Hist. Scot.* vi. 467-471.

² Bishop Guthrie, *Memoirs*, 27.

in the King's name, refusing the prayer of the petitions against the Service-book and the Bishops.

Traquair rode out to Stirling, and, at ten o'clock on the morning of the 20th of February, went to the Market Cross, where he issued the memorable proclamation which brought into existence the National Covenant. This ill-fated proclamation stated that the King was responsible for the introduction of the Service-book; it condemned the riots which had taken place; it declared those who had signed complaints against the Bishops to be disturbers of the public peace; it offered pardon only to those who retracted what they had done; it ordered all who were in Stirling, except the inhabitants and the Lords of Council and Session, to leave within six hours, under pain of high treason.

Traquair had issued the proclamation without submitting it to the Privy Council; but in the afternoon some members of the Council met and signified their approval. Hope was not present at this meeting. On the following morning, however, he arrived from Edinburgh, and the Act of Council approving of the proclamation was submitted to him. He refused to sign it, on the ground that Traquair had exceeded his instructions, by declaring the pain of high treason to be the penalty of disobedience.¹ He stood alone, and was the only Privy Councillor who did not sign the Act.²

The Supplicants answered the proclamation by a "Protestation," in which they shifted all blame from the King to the Bishops; and at each town in Scotland where the proclamation was made, the protestation was at once read as an answer.

The infatuation of Charles speedily bore fruit. The proclamation was made on the 20th of February 1638. On

¹ Baillie, *Letters and Journals*, i. 50.

² *Rothés, Relation of Affairs*, 66.

the 1st of March the National Covenant was being signed in the churchyard of the Greyfriars in Edinburgh.

It is impossible to say what position Hope occupied during the eventful week which passed between the proclamation and the adoption of the National Covenant. According to Guthrie, he was consulted by the Supplicants, and advised the preparation of the Covenant.¹ No meeting of the Privy Council took place from the 20th of February till the 1st of March, so that it is possible he may have been in Edinburgh during that time, and if he was, he must certainly have met Rothes, Balmerino, and the leading spirits of the Covenanting movement. His Diary, however, throws no light on the transactions of that week.

The chief authors of the Covenant were five men whose positions in life make them representatives of the classes from which the leaders of the Covenanting party came. They were Rothes, Loudoun, and Balmerino, who were peers, Johnston of Warriston, an advocate, and Alexander Henderson, a Presbyterian minister. In the great struggle the peers of Scotland were foremost, for the Covenanters were essentially an aristocratic party. Johnston represented the bar, which always took a leading part in every public question. Henderson was a leader of the Church, and the clergy of Scotland were always men of affairs. More than a century before, Sir Ralph Sadler had said of them, "They are the men of wit and policy that I see here." Under such leaders the Covenanters were not members of a democratic or plebeian faction. Throughout the whole movement the influence of the aristocracy was felt. Many of the ministers would have been satisfied with the suppression of the Liturgy.

¹ Bishop Guthrie, *Memoirs*, 30. The "National Covenant" is often confounded with the "Solemn League and Covenant." The Covenant of 1638 was a renewal, with certain changes, of the Covenant of 1580, generally known as the "King's Confession." The "Solemn League and Covenant" was not drawn up till 1643, and applied to England as well as Scotland.

It was the nobles who urged that a struggle should be made against the Bishops. They gained their point; and, when the Covenant was signed, the Covenanters were found to be nobles, landed gentry, ministers of the Church, men of every calling, and ladies of high rank, followed with enthusiasm by the great mass of the people throughout the most important districts of the country.

Hope did not sign the Covenant. There was an understanding that the Officers of State, the judges, and certain members of the bar, should not be required to do so.¹ On the 1st of March, while the Covenant was being signed at Edinburgh, the Privy Council was sitting at Stirling. The Lord Advocate was present, and continued to attend during a consultation of five days, at which it was resolved to send the Lord Justice-Clerk, Sir John Hamilton, to London. Hamilton's instructions were to inform Charles that, in the opinion of the Council, the use of the Service-book should not be insisted on for the present, and that the grievances of the Covenanters should be fairly considered.² Hamilton returned in less than three weeks with a letter directing Traquair, Roxburghe, and Lorne,³ to consult counsel as to the legality of the Covenant, and, having done so, to come up to Court. The Lord Advocate, Sir Thomas Nicolson, and Sir Lewis Stewart, were consulted, and gave it as their opinion that the Covenant was not unlawful. Traquair, Roxburghe, and Lorne then started for London.

Sir Thomas Hope's opinion in favour of the legality of the Covenant has been regarded as "a fact strikingly evincing how much the spirit of faction can bewilder even the most vigorous minds."⁴ But Nicolson and Stewart, both eminent lawyers, were not partisans. Nicolson was soon after spoken

¹ Baillie, *Letters and Journals*, i. 109.

² Burnet, *Memoirs of the Dukes of Hamilton*, 35.

³ Afterwards Marquis of Argyll.

⁴ Mark Napier, *Montrose and the Covenanters*, i. 148.

of by the Marquis of Hamilton as "the only man fit to be set up against the King's Advocate." Stewart was the lawyer whom Traquair, when he quarrelled with Hope, wished to make Lord Advocate, and whom Hamilton afterwards employed to represent the Crown when Hope refused to defend Episcopacy. Whether Hope's legal opinion was right or wrong, his private feelings were warmly on the side of the Covenanters. Writing to the Earl of Morton, a keen royalist, he defends the Covenanters, declaring them to be "a number of the maist loyall and faythfull subjectis that ever a prince had."¹

When the three Privy Councillors went to London affairs had reached a crisis. The law was in abeyance; many persons refused to pay their creditors; and assassinations were of frequent occurrence.² "Our country is at the point of breaking loose," writes Baillie in April 1638. Charles sent the Marquis of Hamilton to Scotland, with full instructions to act as Royal Commissioner.³ He was directed to suspend the use of the Liturgy, but to insist on the renunciation of the Covenant. The Commissioner had no easy task before him. Almost every Privy Councillor was at heart a Covenanter; but the Lord Advocate was, says Burnet, "one of the greatest troubles the Marquis met with; for he, being a stranger to the Scottish law (in which the other was skilled as much as ever any was), was often at a great loss; for he durst advise with him in nothing, and often the King's Advocate alleged law at the Council-Board against what he was pressing." Yet so powerful was Hope that the Marquis did not venture to dismiss him, lest a number of resignations should be the result. All he could do was to complain to the King. In his attempts to induce Hope to say that the Covenanters were acting illegally he

¹ Hope to Morton, 21st March 1638.—Preface to Hope's Diary.

² Baillie, *Letters and Journals*, i. 65.

³ Burnet, *Memoirs of the Dukes of Hamilton*, 50, 51.

entirely failed. Nor would the other leaders of the bar give an opinion in accordance with the King's wishes. "Sir Lewis Stewart," says Burnet, "promised private assistance, but said that if he appeared in public in that matter he was ruined. Sir Thomas Nicolson, who was the only man fit to be set up against the King's Advocate, though he had never all his life before pretended to a nicety in these matters, yet began now to allege scruples of conscience."

Hamilton paid a short visit to London; and Charles was, for the first time, made aware of the real strength of the Presbyterian party in Scotland. When the Commissioner returned to Scotland he carried with him instructions of a much wiser kind than those which he had received on his appointment. The demand that the Covenant should be renounced was abandoned, and a Free General Assembly was promised on certain conditions, one of which was that the Bishops should have a voice in its deliberations.¹ The King's terms were again refused, and Hamilton went once more to Court. Charles now yielded completely to the Covenanters. He agreed to a Free Assembly without any terms. He signed the Confession of Faith of 1580, which formed the first part of the National Covenant, and thus was, to a certain extent, a "Covenanted King." Hamilton reached Scotland on the 17th of September, and issued a proclamation calling upon the lieges to sign the King's Covenant. It was at the same time announced that an Assembly would be held at Glasgow in the following November, and a Parliament in May 1639.

Hope was now satisfied. He thought that the King had made reasonable concessions, and looked forward to a period of national tranquillity. But most of the Covenanting laymen thought otherwise. The Lord Advocate's opinion was that of the clergy. There was a split in the ranks of the

¹ Burnet, *Memoirs of the Dukes of Hamilton*, 55-68.

Covenanters. The National Covenant was pitted against the King's Covenant; and the Covenanting peers used every effort to prevent the signing of the latter. "I am brought," Hope said, "to such a perplexity that I know not where to fix my mind. I dare not deny obedience to my Sovereign, where he commands that which is lawful and agreeable to God's Word. On the other hand, I cannot find it in my heart to think ill of what they, whom God has so mercifully and wonderfully blessed in the beginning of this work, seem to incline to."¹

An incident which took place about this time shows that even among the judges of the Court of Session, who were usually ready to please the King, there was great sympathy with the policy of the Covenanting nobles. At the beginning of November, Hamilton went to the Tolbooth, and requested the judges to sign the King's Covenant. The Lord Advocate's son, Sir John Hope, who had been made a judge in 1632, refused; so did Sir John Scot, the author of the amusing satire on the "Staggering State of the Scots Statesmen;" so did Sir George Erskine, an old judge, who had been, along with James the Sixth, a pupil of Buchanan; and so did Sir Alexander Gibson, known to Scottish lawyers as the author of "Durie's Practicks."²

The Assembly was to meet on the 21st of November. Hope had assisted the Lord Clerk Register in his preparations for summoning it, and intended to be present. Hamilton informed the Privy Council that the King wished Episcopacy to be retained, although in a limited form, and moved that a resolution in favour of this policy should be adopted. Some of the Council were inclined to yield; but Hope opposed the motion, and succeeded in defeating the Commissioner. Hamilton then read a letter from the King,

¹ Hope to Rothes, 2d October 1638; Baillie, *Letters and Journals*, i. 474.

² Baillie, *Letters and Journals*, i. 112.

desiring the Privy Councillors to attend the Commissioner when he went to Glasgow for the Assembly. The Lord Advocate was informed that he was expected, not only to go to Glasgow, but to defend Episcopacy in the Assembly. Hope replied that it was against his conscience to do so, for he regarded Episcopacy as contrary to the law of God and the law of Scotland. "This brisk answer," says Burnet, "though it was no surprise to the Marquis, put his temper to a greater trial than anything he met with in Scotland." He told the Lord Advocate he would turn him out of office. The Lord Advocate retorted that he could not. "My appointment," he said, "has been ratified in Parliament." The Marquis then begged him not to go to Glasgow, and Hope agreed to stay away from the Assembly.¹

The Assembly met at Glasgow on the appointed day. Hope, as he had promised, was not present; and Sir Lewis Stewart performed the duties of King's Advocate. Every thing went against the King. On the 28th the High Commissioner left in disgust, and issued a proclamation commanding the Assembly to dissolve, under the pains of treason. But this proclamation was disregarded; and the ministers continued to sit in council till the 20th of December, when they adjourned, having condemned the Five Articles of Perth, and declared Episcopacy to be abolished. On the day before he withdrew from the Assembly, Hamilton wrote a long letter to the King in which he suggested that Hope should be dismissed. "The Advocate," he said, "should be removed, for he is ill disposed. I know none so fit for his place as Sir Lewis Stewart. My Lord Treasurer's friend he is: Sir Thomas Nicolson being no ways to be trusted in what may concern the offices of the Church."²

Before the Glasgow Assembly rose Hamilton told the

¹ Burnet, *Memoirs of the Dukes of Hamilton*, 92.

² Hardwicke *State Papers*, ii. 117.

King that war was inevitable; and in the spring of 1639 the royalist army was ready. The Covenanters met in council. A paper, said to have been written by Balmerino, Henderson, and the Lord Advocate, was read. It maintained the lawfulness of enlisting a Covenanting army. In May the army of the Covenant took the field, under the command of General Leslie, whose body-guard was a company of advocates, "well apparelled," and led by Sir Thomas Hope, son of the Lord Advocate, and Sir Alexander Gibson of Durie. Peace was concluded before any blood was shed; the terms being that a General Assembly and a Parliament should be at once convened. The Assembly met on the 2d of August, and on the 17th an Act was passed abolishing Episcopacy. "To the unspeakable joy of all them that fears the Lord, and waits for his salvation," is the comment made by Hope on this event.¹

The Assembly rose on the 30th of August 1639, and next day the Estates of Parliament met.² On this occasion, which Balfour calls "the last Parliament held in this Kingdom, the royal prerogative being yet entire," the Estates met for the first time in the great hall which has ever since been known as the "Parliament House."

Most unfortunately for himself, Charles did not deal fairly with the Covenanters. Although the Committee of Articles duly prepared the Acts for abolishing Episcopacy, they were not submitted to Parliament, which was prorogued from time to time. The last prorogation took place on the 14th of November. On that day the Lord Advocate produced a warrant for a prorogation till the 2d of June 1640, which was read aloud by the Clerk of Parliament, Sir Alexander Gibson;³ but when Hope called on Gibson to

¹ Hope's Diary, 17th Aug. 1639.

² Hope's second son, Sir Thomas, was one of the two members for the County of Clackmannan.

³ Eldest son of Sir Alexander Gibson of Durie, one of the judges who had refused to sign the King's Covenant in the previous year.

prorogue Parliament till the day named in the warrant, he answered that he had already read the warrant to the House, and was ready to read it again, but that he could in no other way prorogue Parliament. The Earl of Rothes rose, and, in the name of the Estates, warned Gibson, on pain of his life, to do nothing more. Hope then turned to the junior clerk and called on him to prorogue Parliament. He refused. All the members of the Government rose and walked out of the House, except the Lord Advocate, who was left to fight the Opposition alone.

Johnston of Warriston now rose, and read a protest against the King's conduct. Hope protested "against the foresaid declaration, in so far as the same is derogatory to his Majesty's power and authority, or to his Majesty's sole power of prorogating Parliament, or against the lawfulness of this prorogation." He was begged not to insert his protest on the records of Parliament, but insisted on doing so. The Estates then rose till the 2d of June 1640.¹

Early on the morning of the 14th of January 1640, Rothes came to the Lord Advocate's house, and read to him part of a letter which he had just received from England. "I am sorry to write," it was said, "that there is a slap to come upon the Advocate, such as came last year upon the Earl Argyle, to draw up *super inquirendis*, and, therefore, if you have any interest in him, bid him beware of himself."

"My Lord," said Hope, "I care for nothing; I rest upon the Lord. Only I wish that God direct you, who are noblemen, so that you may seek the main point, which is God's truth, to be ratified, and let the rest come as the Lord pleases."

Rothes answered that, even though the King ratified all their Acts, the Estates would not rest till they had revenged themselves on Traquair, who had calumniated them to Charles.

¹ Act. Parl. Scot. v. 254-258.

"My Lord," Hope replied, "for God's sake let not revenge against him move you to neglect God's cause; and for my revenge, I leave it to God."

"We know for certain," said Rothes, "that the King will never give up Bishops, but will have them in again."

"Let no reports move you," was Hope's answer, "but do your duty. Put his Majesty to it, and if it be refused, then you are blameless. But if, on these reports, you press civil points, his Majesty will make all Protestant princes see that you have not religion for your end, but the bearing down of Monarchy."

Rothes then left, Hope's last words being, "For civil points, never look to have me go with you."

In the afternoon of the same day Hope received a letter from Charles, in which he was directed to go at once to Craighall, his country house, in Fifeshire, and remain there during his Majesty's pleasure. Some remissions to accused persons, said to have been granted by the Lord Advocate, were stated as the ground of this command; but the real reason was his sympathy and dealings with the Covenanters.¹

Hope at once started for Craighall. "I was in Bruntland a nycht, on Thursday the 16 of Januar. I cam to Craighall on Fryday the 17 of Januar, about 12 hours. My wyfe, with the twa young barnis, cam to Craighall on Fryday the 14 of Februar, and went bak on Mononday the 17 of Februar. Item, on Mononday the 24 of Februar, scho, with all the rest of my familie, cam to Craighall."²

¹ Burnet, *Memoirs of the Dukes of Hamilton*. The King's letter was dated Whitehall, 4th Jan. 1640; Hope's Diary, 14th Jan. 1640.

² Sir Thomas Hope had married Elizabeth, daughter of John Bennet of Wallingford. They had four sons and two daughters. His sons were: Sir John, his heir; Sir Thomas, afterwards a judge; Sir Alexander, cupbearer to Charles the First; and Sir James, from whom the Earls of Hopetoun are descended. His daughters were: Mary, married to Sir Charles Erskine of Alva; and Anne, married to David, Lord Cardross.—Douglas' *Baronage*, 58.

Banishment to Craighall was no hardship to Sir Thomas. He was a man of warm feelings, fond of his family, and always ready to exchange the turmoil of politics for the quiet of private life. It is from his Diary that we learn most of his private character. This Diary, a most interesting book, has the rare charm of being evidently written solely for his own personal use. He exposes all his joys and sorrows, his strength and his weakness, his deep religious emotions, and his curious superstitions. In instances of superstition the Diary abounds. He hears words spoken by unearthly voices. His dreams foretell future events. The trivial incidents of daily life are the omens of things about to happen. On the margin of the page he notes down the number of "words heard." "This day," he writes in September 1639, "about 3 in the morning, I calling to mynd the croce proceedings in Parliament (quhairof I haif a large journall every day since it satt down), and the difficult and hard estait quhairin the Kirk and Kingdome standis, did pour furth my heart in prayers and teiris to the Lord, and betuix the feir of judgement for syn, and the expectatioun of pardoning mercie in respect of the glorious work alreadie done be the Lord in his Kirk; and thairefter falling in a slumbering, I hard thir words, 'My work is a perfytt work.' The Lord perfytt it! And upoun the morn, being Mononday, 23 September, betuix 4 and 5 in the morning, I being re-graiting the greitt difficulties of the ratificatioun of Godis treuth be the Parliament, be ressoun of the questiounes movit be the barones anent the 3 Estait, thir words cam to me, 'I will do it in my awin way.' For quhilk I blesse the Lord, and believes that the Lord will do it in his awin glorious way."¹

His dreams, as well as the words he hears, are duly recorded. At a time when one of his grandsons, whom he

¹ Hope's Diary, 22d Sept. 1639.

calls "the comfort of my lyff," is ill, he dreams that he had been wearing a diamond ring, and had lost the stone. This "putt me in ane great feir." He thinks the boy will die. "But the Lord had mercie on him, for he beguid to recover on Tuysday, the 19 Januar. Blessit be the Lord."

On another occasion he mentions having had four dreams in three days. Two of these dreams are somewhat ludicrous. "This nycht I thought that a tooth (quhilk was loose) fell out of my gumes, and that I took it in my hand and keip it, thinking to have it set in again, and it seemed to me so real that while I awakit I thocht it reallie trew, and could scarcely believe it to be otherwise quhen I had awaked. Thir repetit dreams portendis some calamitie to me or myne: but I haif ressoluit to submitt myself to my good Lord, and to adore his providence; and the Lord give me gr̃ace to bear it patientlie: At nycht I dreamit that quhil I wes pulling on my left buit, both the tungis of it brak. (This fell out reallie on 26 September thairefter, being Tuesday morning. God prepare me. The Lord prepare me, for I luik certainly to suffering in suche way as my Lord plessis.)"

The notes on public events are few and short; but the Diary abounds in accounts of incidents in the family history. "About 3 efternoone my dauchter Anne Foules delyverit of a man child, blissit be the Lord: and givin to the midwyff jdd. angel. But the bairne wes verie waik, and I desired him to be baptisit: quhilk my wyff excusit, that thai durst not tak the bairne furth in the cold air; And it plesit God to keip in his lyfe till Sounday, at 7 hours; and I causit him to be baptized be Mr. Andro Ramsay, in the Magdalen Chapell, and he wes namit James. And my wyff was angry at my grieve."¹

Of Lady Hope, the Lord Advocate's wife, we hear little

¹ "Anne Foules" was the daughter of Robert Foules of Leadhills, in Lanarkshire, and wife of Sir James Hope (son of the Lord Advocate), from whom the Earls of Hopetoun are descended.

in the Diary. When two of their sons are going to London, Sir Thomas gives each of them a copy of the *Imitatio Christi* of Thomas à Kempis, "with command, ilk day, in morning and evening, to reid ane chepter thereof." Lady Hope gives them two rose-nobles each; and sends to her courtier son, Alexander, cupbearer to the King, supplies of meal, pease, cheese, salmon, and herrings.

At the end of May the Lord Advocate was desired to leave Craighall and return to his duties. "At 9 of the nycht James Philp brocht me the Kingis Majestie's letter, commanding me to repair to Edinburgh; and I went on Setterday, 30 May."¹ His services were again required.

Parliament had been prorogued till the 2d of June 1640. The Covenanters were anxiously awaiting the arrival of that day; but Charles had made up his mind to attempt another prorogation. Traquair was afraid to revisit Scotland as Commissioner.² In his absence the assistance of Hope was needed to secure, if possible, an adjournment of the Estates. What now took place proved that the Court party were in a position of great difficulty. In the previous year, when Traquair was appointed Commissioner, a second Commission was granted to Elphinston, Napier, the Lord Advocate, and the Lord Justice-Clerk, empowering them to act as Commissioners in the absence of Traquair.³ When the House assembled, on the 2d of June, the Lord Advocate requested Elphinston, whose name stood first in the Commission, to go up to the throne with him and the Justice-Clerk and prorogue the Parliament. But Elphinston raised a difficulty. They were, he said, only entitled to act under the directions of the Commissioner, and, therefore, must have a warrant from Traquair. Hope replied, "that as when the King himself is present a Commissioner's power of itself

¹ Hope's Diary, 28th May 1640.

² Laing, Hist. Scot. iii. 179.

³ Burnet, Memoirs of the Dukes of Hamilton, 167.

expires, so also when his warrant is produced, there is no need of one from his Commissioner." Elphinston would not listen to this, and, although the King's wishes were well known, refused to act. Napier followed his example. Thus only the Lord Advocate and the Justice-Clerk were ready to carry out the King's wishes; and, as two Commissioners were not entitled to act alone, the Parliament could not be prorogued. According to Burnet, "many imputed this to the King's Advocate's juggling; but he vindicated himself solemnly, which is extant under his hand, with a long narrative of this whole affair sent up by him to the King."¹

The Estates proceeded to business, and passed a number of Acts. It was declared that all future Parliaments should consist of Nobles, County Members, and Burgh Members, without Bishops. Triennial Parliaments were introduced; the Acts of the last General Assembly, in favour of the Church, were ratified; Churchmen were declared incapable of being judges of the Court of Session; the procurators for the State were forbidden to plead for persons accused of crimes against the public, it being their duty to act with the Lord Advocate as prosecutors.²

Parliament rose on the 11th of June; and on the following day Hope returned to Craighall, where he remained till November, watching the progress of events. The second Covenanting army marched into England. "Item, the army wes to marche out of Edinburgh on Mononday the 20 of July, and in it my two sones, and Cambuskenneth; And, in respect thairoff, I promisit to the Lord a restraint of thingis otherwayis lawfull."³ His son Thomas again commanded the company of advocates known as the General's Life-guard. According to Guthrie, the lawyers did not distinguish

¹ All Hope says in his Diary is—"The Parliament could not be prorogued for want of Commissioners, and the Estates sat from 2 Junij to 11 Junij inclusive."

² Act. Parl. Scot. v. 259-307.

³ Hope's Diary, 1st July 1640.

themselves in the skirmish, which took place at Newburn, where the Tyne was crossed, just before the occupation of Newcastle. "The first party," he says, "that was appointed to advance, was the College of Justice's Troop (called the General's Life-guard), commanded by Sir Thomas Hope, younger son to the King's Advocate (whom his father had bred, as also all the rest of his children, towards the love of that cause). But Sir Thomas and his Troop were scarce well entered the ford, before they wheeled about and retired with discredit." The account given by the Lord Advocate of this affair in his Diary is: "28 Aug. 1640: our armie corsit Tyne, and discomfitit the Inglis troupes that did prohibit them." He hears from his sons of the victory at Newcastle; and he waits, with painful interest, for news of how things are going at Ripon. "This day, being greivit for the report of the divisioun in the camp, occasionat be the Erl of Montrois, I wes humbly supplicating the Lord (remembring the words quhilk I hard 22 Sept. 1639), and efter falling in a slumber, I seymit to heir thir words, 'Ask still, and the end shall be glorious.' And after walking and blissing the Lord, I fell in slumber agane, and hard thir words, 'And yow sall sie it.' The Lord in mercie performe it in his awin good tyme."¹ The conclusion of peace he devoutly regarded as an answer to his prayers.

The Estates met on the 14th of January 1641, when the Lord Advocate produced a warrant by which Parliament was prorogued till the 13th of April. Soon after this Hope received, from the Committee of Estates, summonses against the Incendiaries, as Traquair, Spotiswoode, and other opponents of the Covenant were called, which he was desired to sign as King's Advocate. He declined, on the ground that he had no warrant from the King to do so; and, in the following month, he promised to Charles that he would not take any

¹ Hope's Diary, 12th Oct. 1640.

part in this prosecution without his Majesty's express permission.

On the 13th of April Parliament was again prorogued till the 25th of May. Early on the morning of that day the Lord Advocate received a letter from the King desiring him to prorogue Parliament once more, till the 15th of July. He at once went to the Committee of Estates, and informed the members present that another prorogation was proposed. They reluctantly agreed to obey; and then read to the Advocate a report which they intended to lay before Parliament. It contained instructions to him, as Lord Advocate, to prosecute the Incendiaries. He told them he would refuse to do so; and the Committee rose.

When the Estates met in the Parliament House, at a later hour, the Lord Advocate, standing by the throne, announced the prorogation till the 15th of July, when, he said, the King faithfully promised either to appear in person, or send a Commissioner to represent him. The Clerk then proceeded to read the report of the Committee of Estates. When he came to the words, "commanding the Advocate to prosecute," Hope rose, and requested leave to speak. The Clerk read on. Hope appealed to Burleigh, who was in the chair, and obtained a hearing. He then explained that, the King having forbidden him to prosecute, and the Estates having directed him to do so, he must enter his protest, and decline to act. He accordingly did so. On this a resolution was moved and adopted, enjoining the King's Advocate, or any counsel employed by the State, not to act for any of the Incendiaries, under the pains of treason. The House then rose. In the evening Hope wrote an account of the day's proceedings to the King and the Earl of Lanark, Secretary for Scotland.¹

¹ Balfour, *Annals*, iii. 1-3; *Act. Parl. Scot.* v. 307; Hope's *Diary*, 25th May 1641.

On the 15th of July, the day named by the King, the Estates met; and Burleigh was again chosen President. Charles did not appear, but promised to come on the 17th of August. By a majority of fifty the House decided to sit until that day, and prepare measures to be ready for the arrival of the King.

One point which had been strongly urged at Ripon was that a change should be made in the mode of naming the Officers of State. The Estates were now determined to deprive the King of the power of appointing them, and, in the constitutional history of Scotland, the Parliament of 1641 is chiefly memorable on account of the encroachments made on this part of the royal prerogative.

This attack on the rights of the Crown involved taking from the King the power of appointing the King's Advocate. But before the mode of appointment was settled, a question was raised as to whether the Advocate might sit in the House, without being returned for some constituency. His right to do so being challenged, he answered that he was there as an Officer of State, and that he "and his prædecessors for 160 zeires, wer in possession of a place and vote ther." The House heard him at great length, and, reserving its decision, directed him to withdraw.¹

A few days after this there was a long debate on the subject of the Lord Advocate's position, when the House came to the following decision,—that they thought it expedient "to call the Advocate into the House, to sit upon the foot of the throne, covered, with his hat upon his head,

¹ It will be noticed that Lord Advocate Hope spoke of his "predecessors for a hundred and sixty years." This would take us back, from the time when he spoke (1641), to the year 1481. Sir John Ross of Montgrenan appears as King's Advocate for the first time in 1483, and as Hope would use round numbers in addressing the House, he was probably alluding to Ross. On an important question of privilege resting on prescription, he would certainly make careful inquiry, and we may, therefore, conclude that Ross of Montgrenan was, in Hope's time, regarded as the first of the King's Advocates who held a place in Parliament, if not actually the first person appointed to that office.

to answer what shall be demanded of him by the Parliament, who declare that these present shall give no further privilege to him, nor shall give him no voice in Parliament, seeing he is only called by the Parliament to sit and hear, and answer when he is asked, so long as they have to do with him.”¹ Thereafter, during the rest of the session, the place of the Lord Advocate was on the steps of the throne, covered, but without a vote; and he was allowed to speak only when called on by the House.

This attack on the privileges of the King's Advocate was only the first of many humiliations to which Charles was now to be subjected. He appeared in the Parliament House on the 17th of August, and was soon compelled to face the question of the Officers of State, the Privy Councillors, and the judges of the Court of Session. The bill, previously prepared by the Estates, was read in the House on the 16th of September. It proposed that the Officers of State, the Privy Councillors, and the Lords of Session should in future be appointed, not by the King alone, but by the King with the advice and consent of Parliament, while Parliament was sitting, and while Parliament was not sitting, by the King with the advice of the Privy Council, subject to the consent of Parliament at its next meeting. The reason given for this proposal was that the King's necessary absence from Scotland made it impossible for him to know who were best fitted to govern the country. Charles, who well knew that this reason was only a pretext for striking a deadly blow at the prerogative, could not but submit. He did so with a good grace, accepted the bill at once, and said that on the following day he would lay before the House a list of Privy Councillors, Officers of State, and Judges. On receiving this answer from the King, the whole House rose, and bowed to his Majesty. The Act was then passed; after which Sir Thomas Hope of

¹ Act. Parl. Scot. v. 324.

Kerse, the Advocate's son, Speaker for the Barons, "had," says Balfour, "a prettey speich to his Majestie, in name of that bodey, for his so gracious aussuer to ther demandes."¹

Next day, Friday, the 17th of September, the list of Privy Councillors was in the hands of members in the morning; but, without considering it, the House adjourned till the following Monday. In the afternoon the Committee of Estates met and resolved that the names of the Officers of State ought to be known before Parliament began to discuss the list of Privy Councillors.² The King was informed of this; and, when the House met on Monday the 20th, he gave in a list of the Officers of State whom he wished to appoint. He had arranged his Cabinet as follows,—Morton was Lord Chancellor, Loudoun Treasurer, Roxburghe Privy Seal, Lanark Secretary of State, Gibson of Durie Lord Clerk Register, Hope Lord Advocate, Sir John Hamilton Justice-Clerk, Sir James Carmichael Treasurer-Depute, and Sir James Gallaway Master of Requests. These nine Cabinet Ministers, added to the Privy Councillors previously named, made the number of the Council fifty-two, a number which the King said he would not exceed in future. To Hope and others of the Officers of State no objection was made. But the Earl of Argyll opposed the nomination of Morton, on whose character he made a violent attack.³ The debate lasted for two days without any result being reached.

While matters were in this state, Sir Thomas Hope of Kerse, on behalf of the Barons, moved that when the Estates came to appoint the Officers of State and Privy Councillors, the vote should be taken by ballot, "that occasions of gaining the favour or incurring the displeasure of the parties interested may be avoided as far as may be." The voting-

¹ Act. Parl. Scot. v. 354, Stat. 1641, cap. 21; Minutes of Parl. 31st Aug. 1641; Act. Parl. Scot. v. 654; Balfour, Annals, iii. 64, 65.

² Minutes, 17th Sept. 1641; Act. Parl. Scot. v. 666.

³ Balfour, Annals, iii. 69, 70.

papers, bearing the words "allows" or "rejects," were to be used "as the voter in his conscience shall find the party named to deserve." The comment made on this motion by the King, who took part in the debate, was that, in his opinion, the man who feared to vote freely was unworthy of a seat in Parliament.¹ This plan of voting by ballot was however abandoned.

For three days the question of the Lord Chancellorship was fiercely debated. The King had withdrawn Morton's name, and proposed that of Loudoun. But Loudoun also was objected to, and each hour that passed put a wider gulf between Charles and his Parliament. As Hope of Kerse said, it was "like the stretching out of two lines, the further they be drawn, the further distance they keep between." On the third day of the debate, Kerse moved that the Estates should meet the King half-way, by accepting Loudoun under protest that they did not acknowledge the King's right to appoint his other Officers of State without the approval of Parliament. To this compromise Charles agreed, and Loudoun was appointed.²

The business of Parliament was now interrupted by the well-known episode of The Incident. A report was spread that Hamilton, Argyll, and Lanark were to be seized and murdered, and that they had found it necessary to fly for safety. Hints were thrown out against the good faith of the King, who was accused of being privy to the plot. The whole affair was, as it has been ever since, wrapped in mystery. Charles demanded a public inquiry into the matter. Sir Thomas Hope of Kerse moved for a private inquiry before a Special Committee. Day after day, from the end of September till far on in October, Edinburgh was excited by rumours of plots that either had been, or soon

¹ Balfour, *Annals*, iii. 71, 72; *Act. Parl. Scot.* v. 667.

² Balfour, *Annals*, iii. 81-85.

would be, discovered, and Parliament continued to debate whether the public investigation which the King demanded, or the private inquiry proposed by Kerse, should be adopted. On the 15th of October the Lord Advocate was called upon to speak. It was expected by a majority of the House that he would declare himself in favour of a private inquiry; but, in a long speech, he supported the proposal for a public investigation, on the ground that a private inquiry would leave, in some minds, lingering suspicions of the King's honour. When the Lord Advocate sat down, Kerse rose and maintained that a Committee sitting in private would sift the matter more thoroughly. "If men," exclaimed the King, "were as charitable, Sir Thomas, as not to believe false rumours, I would be of your mind. But since I see the contrary, you must give me leave to think otherwise." Again the Lord Advocate spoke, and strongly opposed the arguments of his son. Again and again the King demanded a public inquiry. It was in vain. On the 21st of October the struggle was at an end, and a Special Committee was appointed to investigate the affair, which has never since been cleared up.¹

On the 13th of November the Officers of State were appointed. Loudoun was Chancellor. The office of Treasurer, about which great difficulties had arisen, was put in commission till next Parliament.² The Lord Advocate and other Officers were appointed in accordance with the list originally presented by the King.³ When the roll of the Privy Council was finally adjusted, of the names submitted by the King to the Estates only eight had been deleted.⁴

Four of the fifteen judges of the Court of Session were

¹ Balfour, *Annals*, iii. 81-117; Laing, *Hist. Scot.* iii. 214-222; Hill Burton, *Hist. Scot.* vii. 146-152; Napier, *Montrose and the Covenanters*, ii. 110-157.

² Stat. 1641, cap. 69; Act. Parl. Scot. v. 388.

³ Stat. 1641, cap. 67, 70.

⁴ Balfour, *Annals*, iii. 148-150; Stat. 1641, cap. 71.

dismissed. One of the new judges, appointed by the Estates, was Sir Thomas Hope of Kerse, who was also made Justice-General of Scotland. Another was Johnston of Warriston, who at the same time received the honour of knighthood. It must have been with great reluctance that Charles bestowed these favours on the framer of the Covenant; but nothing shows more clearly how little the King's wishes were consulted at this time than the fact that the Earl of Argyll became a Marquis, and Balmerino was made an Extraordinary Lord of Session.

Though Lord President Spotiswoode and Sir John Hay were dismissed from the bench, the proposed trial of the Incendiaries was abandoned, and the Lord Advocate was thus saved from the dilemma in which he had been placed by the conflicting orders of the King and the Estates.

Hope knew that the prerogative had been invaded, and suggested to Charles that he should protect the rights of the Crown by placing on record his protest against all that had been done; but the King was persuaded not to follow this advice. "This dangerous noveltie," says Baillie, "of casting all loose his Majestie at last was moved to give over, most by Mortoun's persuasion. The author for this, and other his needless offices, obtained to his sone Sir Thomas, not onlie a place in the session, bot also, to the indignation of the nobilitie, a patent to the Generall Justiciarie, at least for one year."¹

Just before Charles left the Parliament House, the Earl of Loudoun and Sir Thomas Hope of Kerse thanked him, in

¹ Letters and Journals, i. 397. Baillie was much annoyed, during this session, because Hope would not at once agree to everything the Church wanted. "We had," he says, "obtained some triffling Acts for the Church; bot that which we most intended verie hardlie could be obtained, our Commission for settling the churches and schooles. We had here few or no reall friends. The Advocate, with his idle curiositie, put us to infinite difficulties. When we had gotten him somewhat satisfied, then sundrie of all the Estates carped for their own interest at every other clause of it."—*Ibid.* 394.

the name of the peers and gentry, for his concessions, and declared that "now a contented King was to depart from a contented country." It was late when the House rose. As Charles rode down the dark streets to Holyrood, volleys were fired from the guns of the Castle, and, in the palace that night, all the peers supped with the King, who left for England on the following morning.¹

The events of the next two years are part of British history. From the time that the Parliament of Scotland rose till the spring of 1643 the contest between the King and his subjects grew keener and keener. In May 1643 a meeting took place between the Privy Council of Scotland and the "Committee of Conservators of the Peace with England" which had been appointed by the Parliament of 1641. It was proposed by the Church party that a Convention of Estates or a Parliament should be called without a warrant from the King. Argyll and Johnston of Warriston maintained the lawfulness of thus calling the Estates together. Hamilton resisted the proposal. "In this," says Burnet, "he was seconded by my Lord Morton, but most vigorously by Sir Thomas Hope, the King's Advocate, who debated against it so fully, from the laws and constant practice of Scotland, that no answer could be alleged; and indeed discharged his duty so faithfully, that the Marquis forgave him all former errors for that day's service."² The only result of Hope's exertions was a delay of one night. Next day it was resolved to call the Estates together without the authority of the King. At the meeting when this was decided neither Hamilton, Morton, nor Hope appeared.³

The Convention of Estates sat on the 22d of June. A letter from the King was read, in which, while denying the

¹ Balfour, *Annals*, iii. 165; Bishop Guthrie, *Memoirs*, 92.

² *Memoirs of the Dukes of Hamilton*, 218.

³ Baillie, *Letters and Journals*, ii. 68.

lawfulness of the Convention, he gave the Estates leave to consider the condition of the Scottish troops in Ireland, and the best means of preserving peace in Scotland. A long debate took place as to whether the Convention was free to discuss other subjects than those mentioned in the King's letter. On a vote, it was decided that the Convention was absolutely free; and then Hamilton and his brother Lanark, Secretary of State for Scotland, acting on the advice of Hope, left the House.

The General Assembly met on the 2d of August. Hope was Lord High Commissioner.¹ Baillie says that the Commission came down from London blank, and that, after Lord Lindsay and Lord Glencairn had refused to act, the Secretary put in the Lord Advocate's name without his knowledge. But Bishop Guthrie certainly understood that the King had himself appointed Hope, for he complains that it "discouraged such as intended to have appeared for the King's interest, when they found him so honoured and trusted, concerning whose carriage the King had been so often informed."² Burnet, too, says that, when the time for the Assembly came near, the King was advised to appoint the Lord Advocate as his Commissioner so as to "encourage" him; and "On the 1st of August," he says, "came the King's Advocat's Commission, with his instructions, and a letter to the Assembly."³ This exactly tallies with an entry in Hope's Diary: "1 August 1643. This day, after the preaching, Lanerick came to me, and gave me his Majesty's letter anent the Commission to the Assembly, which made me astonished. The Lord direct me in it."

The Commissioner's instructions were to assure the

¹ Lord Advocate Hope's appointment is the only occasion on which a commoner has ever been Lord High Commissioner to the General Assembly of the Church of Scotland.—Acts of Assembly (1638-1842), ed. 1843, p. 1204.

² Memoirs, 116.

³ Memoirs of the Dukes of Hamilton, 235.

Assembly of the King's adherence to the late establishment of the Church, to oppose all treaties with England, to oppose any new Commission of the Church, and to prevent any censure on those who had signed the cross petition.¹ "The instructions," says Baillie, "were thought to be very hard; yet the Advocate did not execute, nor name any of them to count of; for he was so wise, and so well dealt with by his two sons, that he resolved to say nothing to the Church or Country's prejudice."² Hope had, indeed, candidly informed the King that the instructions did not meet with his approval. "Immediatlie after reiding of his Majestie's instructiounes, I directit a letter to his Majestie, schewing the impossibility off the last Article: daitit 1 Aug. 1643."³ While the Assembly was sitting, Hope constantly sent to the King accounts of its proceedings. The chief result of these proceedings was the production of the Solemn League and Covenant, which was formed for the preservation of the reformed religion in the Church of Scotland, and the reformation of religion in the Churches of England and Ireland, "according to the Word of God, and the example of the best reformed Churches," and which the members of Assembly understood to mean the establishment of Presbyterianism in England and Ireland. When the Solemn League and Covenant was read, Hope urged delay till it had been communicated to the King.⁴ But it was at once adopted, and Commissioners were appointed to carry it to England, where it was afterwards approved by the Houses of Parliament and the Westminster Assembly of Divines.

It was said of Hope that, as Commissioner, "he took the place proudly upon him, for the crown, sword, and sceptre were daily carried before him, and at preaching he sat in the King's loft." But, soon after the Assembly rose, he

¹ *Memoirs of the Dukes of Hamilton*, 235.

² *Letters and Journals*, ii. 83.

³ *Hope's Diary*, 1st Aug. 1643.

⁴ *Burnet, Memoirs of the Dukes of Hamilton*, 239.

wrote in his Diary: "This day I vowit to my Lord, humilitie, patience, abstinence, sobriety, and not to eat but one kind of meat at dinner, and not above two drinks of wine. The Lord give me grace to perform it." These vows were recorded when he was mourning the sudden death of his second son, Sir Thomas Hope of Kerse, whose short but brilliant career ended on the 23d of August 1643.¹

Hope had now been nearly forty years at the bar, and for seventeen years he had been Lord Advocate. He never again took a prominent part in public affairs. The Solemn League and Covenant was no message of peace. General Leslie, now Earl of Leven, marched into England at the head of twenty thousand men. Thomas Hope, the former captain of his body-guard, was lying dead in the Greyfriars' Churchyard; but, before the General started, he called to say farewell to the old Lord Advocate. "General Leslie, his Excellence, cam to my chamber about 6 at nycht, and tuik his leve of me, being to begin his journey in England on the morow, being Twysday."²

In Parliament, and in the Law Courts, Hope's duties were now light. The distrust with which the dominant party regarded every office, if not every Officer, of State had produced great changes in the functions of the Lord Advocate. His powers as a law officer were diminished. These powers he now shared with the Procurators for the State. On the 8th of January 1644 the Convention of Estates appointed "Maister Thomas Nicolsone to be ordinar procurator for the estates, and Mr. Robert Dalgles to be agent." They were to consult the Lord Advocate, and other counsel of

¹ Sir Thomas Hope of Kerse died in his thirty-seventh year. He was born on the 6th of August 1606, came to the bar in 1631, was knighted by King Charles in 1633, was member of Parliament for Clackmannan from 1639 to 1641, was made a judge of the Court of Session and Justice-General of Scotland in 1641, and at the time of his death was member of Parliament for Stirlingshire.—Brunton and Haig, 306.

² Hope's Diary, 8th Jan. 1644.

eminence, when they wanted help.¹ The Lord Advocate still retained his position as a member of the Government; but the Procurators for the Estates acted as public prosecutors, and seem very rarely to have consulted the Lord Advocate, even on points of law.

Hope now seldom appeared in the Parliament House unless sent for by the Estates. He spent much of his time at Craighall, and heard, with interest, of the progress of events in England. On receiving news of the battle of Marston Moor, he writes, "Our armie, by the blissing of God, wes victorious." His comment on the news of the success of Montrose in the north, is, "The Lord be merciful to this poore Kirke and Kingdome, for this is ane sad and heavy strok." The last entry in the Diary is on the 20th of May 1645. A few days before two reports had reached him of the battle between Montrose and General Hurry at Auldearn. First it was said that Montrose had won, and then that he had lost; but on the 20th of May he writes, "The certainty cam off the conflict, quhilk wer worse nor the first report, and litill trew of the second, and the more lamentabill that the worthy laird of Laweris wes killit in that conflict. . . . Item, a letter to my Lord Warristoun anent my Lord Chancellor his answer." Here the Diary ends abruptly. His health had been failing for some time, and during the eventful year which followed, he seldom appeared in public. On the 1st of October 1646, while the Scottish army was bargaining to deliver Charles into the hands of the English Parliament, Thomas Hope left the land of the Kirk and Covenant for ever.

Sir Thomas Hope was not only a great statesman, but a very great lawyer. He had an immense practice at the bar, and, in accordance with the custom of his profession, invested his gains in the purchase of land. He died possessed

¹ Act, Parl. Scot. vi. i. 69.

of estates in Fife, Stirlingshire, Midlothian, Haddington, and Berwickshire. Three of his sons were on the bench,—John, Lord Craighall, and Thomas, Lord Kerse, while he was Lord Advocate; and, after his death, James, Lord Hopetoun. There is a vague tradition that when pleading before his sons Sir Thomas used to remain covered, and that from this circumstance the Lord Advocates acquired the privilege of pleading with their hats on. It is more probable that the Lord Advocate's privilege of wearing his hat in Court originated in the fact that, as an Officer of State, he sat covered in the Parliament House, and, therefore, claimed the right to appear covered before the judges in the Tol-booth.

To lawyers Hope is known as the author of the “Minor Practicks,” a small treatise on Scottish law, which was in constant use at the beginning of last century. This work he is said to have dictated, while dressing in the morning, to his sons during their term of study for the bar. The “Major Practicks,” a work which is still in manuscript, is generally supposed to have been written by him. But this is doubtful.¹

Hope amused himself with studies of a lighter character. His “Carmen Sæculare” has already been mentioned.² He also wrote a translation into Latin of the Psalms of David and the Song of Solomon.³ One of Johnston's epigrams is dedicated to him:—

“Lyncea mens, lingua est tibi nectare dulcior omni,
Labe carens pectus, candidiusque nive,
In vultu Charites, Spes est in nomine, dotes,
Quas alii sparsas, tu simul unus habes.”⁴

Opinions will differ as to the public character of Hope.

¹ Fraser, *Law of Parent and Child*, List of Authors cited. Cf. *supra*, p. 93, note.

² *Supra*, p. 102.

³ MSS. Advocates' Library, 19. 2. 12. His version of the 104th Psalm is printed in *Lauder's Poetarum Scotorum Musæ Sacræ*, ii. 26-28.

⁴ *Jonstoni Poemata*, 374.

He was an avowed supporter of the Covenant; and yet he seems to have enjoyed the confidence of Charles the First. Traquair at one time, and Hamilton at another, tried to drive him out of office. They both failed. This was partly owing to the fact that the Court party was afraid to quarrel with him. But the real secret of his strength lay in the fact that he never failed to distinguish between the civil and the religious questions which were involved in the struggle between Charles and his Scottish subjects. He defended the civil rights of the Crown whenever he thought they were in danger; but he refused to support, under any pretext, the policy of forcing on the people of Scotland a system of church-government which they detested.

CHAPTER VI.

THE COMMONWEALTH.

ARCHIBALD JOHNSTON of Warriston, the Covenanter, whose name has been frequently mentioned in the last chapter, became Lord Advocate on the death of Sir Thomas Hope. He was the son of James Johnston, a merchant in Edinburgh, and Elizabeth, second daughter of Sir Thomas Craig of Riccarton, the author of the "*Jus Feudale*."¹ On the 6th of November 1633 he was called to the bar, and when, five years after, the movement against Episcopacy began, he threw himself heart and soul into the struggle. He assisted in preparing the first draft of the National Covenant; and when, in July 1638, the King's concessions, proclaimed by the Marquis of Hamilton, were rejected, it was he who read the protest against them at the Market Cross of Edinburgh.²

¹ Johnston's mother is said to have been a strong supporter of the Covenant, like many ladies of her time. Mr. Mark Napier surmises that she was the Elspeth or Elspa Craig mentioned by Bishop Guthrie as one of the matrons who planned the disturbance in St. Giles' Church when the Liturgy was read in 1638 (Montrose and the Covenanters, i. 338). But Guthrie couples the Elspeth Craig of whom he speaks with a Bethia Craig. Sir Thomas Craig had only three daughters, Margaret, Elspeth, and Janet (Tytler, *Life of Craig*, 319-329). It is therefore probable that the "Elspeth and Bethia Craig" spoken of by Guthrie were ladies belonging to some other family of the name of Craig. The death of Johnston's mother is celebrated in some curious lines, which are among the Balfour MSS. in the Advocates' Library:—

"Deevil snell ye deathe,
And burste the lyke a tune,
That took away good Elspet Craige,
And left ye knave her sone."

² Rothes, *Relation*, 71; Balfour, *Annals*, ii. 276.

Johnston's sister Rachel was married to Robert Burnet, an advocate, and so intense was Johnston's feeling in support of the Covenant, that Burnet, who was of a different way of thinking, had to leave Scotland until the Restoration. On his return he was appointed a judge, with the title of Lord Crimond. Lord Crimond was the father of Bishop Burnet, who thus describes the character of Johnston: "Waristoun was my own uncle: He was a man of great application, could seldom sleep above three hours in the twenty-four: He had studied the law carefully, and had a great quickness of thought, with an extraordinary memory. He went into very high notions of lengthened devotions, in which he continued many hours a day: He would often pray in his family two hours at a time, and had an unexhausted copiousness that way. What thought soever struck his fancy during those effusions, he looked on it as an answer of prayer, and was wholly determined by it. He looked on the Covenant as the setting Christ on his throne, and so was out of measure zealous in it. He had no regard to the raising himself or his family, tho' he had thirteen children: But Presbytery was to him more than all the world. He had a readiness and vehemence of speaking that made him very considerable in publick assemblies: And he had a fruitful invention; so that he was at all times furnished with expedients."¹ This picture is probably not overdrawn. It is often said that the Scottish Presbyterians of the seventeenth century were harsh and uncharitable. The truth is, that they looked on life so earnestly and so soberly that sadness and austerity became, in many cases, their habitual frame of mind. Johnston was firmly convinced that the cause of the Covenant was the cause of Religion. His Presbyterianism, too, was more uncompromising than that of Hope. Hope's sympathy with the

¹ History of His Own Times, i. 37, 38.

Covenanters was purely religious; Johnston's was both religious and political.

At each crisis during the events which have been described in the last chapter, Johnston was a prominent figure. At the meeting of the General Assembly held at Glasgow in November 1638, when Hope's place as Lord Advocate was taken by Sir Lewis Stewart, he was appointed Clerk to the Assembly; and when he received his commission, a curious incident took place. Two volumes of the records of the Church, from 1590 onwards, were handed to him by Thomas Sandilands, whose father, the late Clerk, had recently died. No previous records were supposed to exist, the books from the Reformation down to 1590 having been lost for some time. It was said that the Bishops had obtained possession of them, and that they had been mutilated or destroyed. While the members of Assembly were bewailing the loss of their archives, "the new Clerk," says Baillie, "declared that, by the good providence of God, these books they spake of were come to his hands, which there he produced to all our great joy." The books thus suddenly brought to light were five folio volumes, forming a complete register of the Church of Scotland from the Reformation to the year 1590. Their authenticity was not at once admitted; and a Committee was appointed to examine them, which, after a thorough investigation, reported that the volumes were "true registers of the Kirk." This report was adopted by the Assembly, and Johnston was thanked.¹

As each year passed, Johnston rose in the estimation of the popular party, of which he was now the ablest member. In August 1639, when Parliament was prorogued, it was he who read the protest against the prorogation,² and vindicated

¹ Baillie, *Letters and Journals*, i. 129-141; *Acts of Assembly*, 28th Nov. 1638; *Reasons for proving the Five Books and Registers produced before the Assembly to be Authentick*; Hill Burton, *Hist. Scot.* vii. 16, 17.

² *Act. Parl. Scot.* v. 256.

the conduct of the Opposition. In June 1640, when the Committee of Estates was appointed, Johnston was made a member, on the ground that he was specially acquainted with the state of the nation.¹ In the same year he was one of the Scottish Commissioners at Ripon, and his services in that capacity were specially recognised by the Estates.² When Charles visited Scotland in 1641, Johnston expected to be made Lord Clerk Register; and for this high office he was eminently qualified by his profound knowledge of legal antiquities. Alexander Gibson, younger of Durie, was, however, appointed. But Johnston was knighted and became a judge of the Court of Session.³

In 1643 Sir Archibald was sent to the Westminster Assembly of Divines, as one of the Commissioners from Scotland. "For the lay elders," says Hill Burton, "there was the redoubted Johnston of Warriston, the most able and zealous of a group of lay statesmen—they were not in all, perhaps, above three or four,—who were as thorough warriors in the ecclesiastical department of the great struggle as the clergy themselves." The Assembly adopted the Solemn League and Covenant, adjusted the famous Confession of Faith, and drew up the Larger and Shorter Catechisms. In its deliberations Johnston took a leading part; and, on more than one occasion, he was honoured by a special vote of thanks.⁴

While the Westminster Assembly was sitting Johnston was appointed Lord Advocate. His appointment was the first which had taken place since those encroachments on the prerogative by which the right of naming the King's

¹ Act. Parl. Scot. v. 284.

² *Ibid.* 336, 361.

³ Durie was Johnston's cousin, his father, Sir Alexander Gibson, having married Margaret, eldest daughter of Sir Thomas Craig, and sister of Johnston's mother. Scotstarvet says that Gibson got the place of Lord Clerk Register through the interest of the Earl of Dysart, "to whom it is said he gave a velvet cassock, lined with fine furrings, and a thousand double pieces therein."

⁴ Minutes of the Westminster Assembly; Hill Burton, *Hist. Scot.* vii. 201.

Advocate was taken from the King alone, and vested in the King with consent of Parliament; and the procedure which now took place illustrates the working of the new system. Hope died on the 1st of October 1646. On the 30th, the King, then in the hands of the Scottish army, granted a commission in favour of Johnston as his "sole and only Advocate during all the days of his life." But the commission was not valid until it had been approved by the Estates. In the Parliament House, therefore, on the 7th of November, Sir Archibald produced his commission, along with a letter from the King, "offering Sir Archibald Johnston to the consideration of Parliament, that he might be called, sworn, and admitted by them to the foresaid place, and to be on his Majesty's Privy Council." The commission and letter were considered by each of the Estates apart. They met again, and, "after debate and voycing," approved of the commission, and gave the sanction of Parliament to the King's choice of a Lord Advocate. Johnston was then called into the House, the oaths were administered to him, and he took his seat on the steps of the throne. At this time the sittings of the Court of Session had been interrupted, but when the judges again met, on the 1st of June 1647, Sir Archibald presented his commission, along with the Act of Parliament approving of it, and was received as Lord Advocate by the bench.¹ There were thus, under the new system, three steps in the appointment of a Lord Advocate: the granting of a commission by the King, the passing of an Act of Parliament approving of the commission, and the presentation of the commission and Act of Parliament to the judges, who thereupon admitted the Advocate to the privileges of his office.

Sir Archibald Johnston retained his seat on the bench; and the Estates confirmed to him a pension of two hundred

¹ Act. Parl. Scot. vi. i. 614; Books of Sederunt, 1st June 1647.

a year, which the King, at the request of Parliament, had granted to him when he was made a judge in 1641. He also received a further pension of two hundred a year, as salary in the office of Lord Advocate, the Estates "understanding that Sir Thomas Hope had the like pension, notwithstanding he had many occasions and means of reaping commodities by that place, which the said Sir Archibald cannot have in respect of his other public employments, and diverse other occasions and reasons which will make that place more burdensome and less beneficial to him."¹

Hitherto the people of Scotland had been united. In August 1647 the General Assembly met peaceably, and ratified the Westminster Confession of Faith; but early in the following year news of the Engagement for the relief of Charles reached Scotland. Henceforth there were three parties: those who opposed making any terms with Charles, unless he submitted entirely on all questions of religion, and who, therefore, opposed the Engagement; those who were thorough-going royalists, ready to support the King with or without terms; and, lastly, the authors of the Engagement.² Lord Advocate Johnston was strongly opposed to the Engagement.

The Estates met early in January 1649, and, at the first sitting, Johnston spoke for an hour and a half against the Engagers. Next day the Marquis of Argyll attacked them at great length, in a speech which he divided into five heads, "which he called," says Balfour, "the breaking of the malignants' teeth, and that he who was to speak after him would break their jaws." As soon as Argyll had finished, Johnston rose, and read a speech, which lasted two hours, and was regarded as his masterpiece, in explanation of Argyll's argument.³

¹ Act. Parl. Scot. vi. i. 837, 838.

² Burnet, *Memoirs of the Dukes of Hamilton*, 336.

³ Balfour, *Annals*, iii. 377.

The Marquis of Argyll and Johnston soon had the management of the House in their own hands. Argyll had promised to Cromwell that no one who had taken part in the Engagement should hold any office of trust in Scotland; and Warriston devised the means by which this promise was to be kept. He prepared the Act of Classes, which passed a week before the execution of King Charles.¹ The effect of this famous Statute was to disqualify all those who were regarded as bad Covenanters, by dividing them into classes and declaring them incapable of holding office. One of the Officers of State who was thus disqualified was Gibson of Durie, the Lord Clerk Register. He had assented to the Engagement, and his place was, therefore, declared vacant.

In March the Estates passed an Act, declaring that it was their duty to fill up the offices rendered vacant by the Act of Classes, but providing that King Charles the Second's interest in choosing the Officers of State should not be prejudiced, "after his Majesty comes to the exercise of his royal authority."² Under this Act Sir Archibald Johnston was appointed Lord Clerk Register.³ The Estates had thus torn away the last shred of the prerogative, and now boldly claimed the right of appointing the Officers of State without consulting the King.

It was resolved to appoint a Lord Advocate, in place of Warriston, in the same way. The choice of Parliament fell on Thomas Nicolson, who had acted as Procurator for the Estates since 1641. The office of King's Advocate was declared to be vacant, and the Estates, "for preventing of the manifold inconveniences which may arise, both to the King's Majesty and to the Kingdom, if the said place and office of King's Advocate be not speedily filled," appointed

¹ Stat. 1649, cap. 30, Act of Classes for purging the judicatories and other places of public trust, 23d Jan. 1649.—Act. Parl. Scot. vi. ii. 143.

² Stat. 1649, cap. 219, Act anent the filling of vauking places, 10th March 1649.—Act. Parl. Scot. vi. ii. 273.

³ Stat. 1649, cap. 403.

Nicolson Lord Advocate, with all the privileges enjoyed by his predecessors. Nicolson thereafter took the oaths and his place in Parliament, and was received within the bar by the judges of the Court of Session.¹ The Lords of Exchequer granted him a salary of two hundred a year, "and in respect that it has pleased God to give the said Mr. Thomas a lawful call to the said place and office of his Majesty's Advocate by the Estates of Parliament; therefore the said lords have recommended, like as hereby they do seriously recommend to the King's Majesty (when it shall please the Lord to give the said Mr. Thomas the blessed and happy opportunity to have access to his Highness' royal person), that his Majesty would be pleased to take to his royal consideration the heavy weight and burden of the said charge, whereunto the said Mr. Thomas is called, and that his Highness would be pleased, in his royal wisdom and bounty, to find the way how to enable him to the undergoing thereof." In the meantime they ordered his salary to be paid to him, an order which was afterwards ratified in Parliament.²

Lord Advocate Nicolson had the "blessed and happy opportunity" of seeing the King, when Charles came to Scotland, and took the Covenant, in the following year. He was knighted by his Majesty, at Falkland, on the 10th of July 1650, "in the withdrawing-roune after supper, one Wedinsday,"³ and acted on the Committee appointed to arrange for the coronation.

In the meantime Johnston was enjoying the office of Lord Clerk Register. In September 1650, when Cromwell was at Dunbar, and Leslie⁴ was watching him from the hill of Doon, Johnston was in the Scottish camp as a member of the Committee of the Estates, which had been appointed

¹ Act. Parl. Scot. vi. ii. 274, 282; Books of Sederunt, 2d June 1649.

² Act. Parl. Scot. vi. ii. 543, 544.

³ Balfour, Annals, iv. 81.

⁴ David Leslie, afterwards first Lord Newark. Alexander Leslie, Earl of Leven, served as a volunteer at Dunbar.

to superintend the movements of the army. The mistakes which led to the battle of Dunbar and the defeat of Leslie are well known. The Scots had Cromwell at their mercy so long as they remained on the high ground ; but they gave up their advantage, descended, fought, and were defeated. The fatal movement, which produced such disastrous results, was made under the directions of the Committee of Estates, and against the wishes of Leslie. "Many," says Burnet, "have thought that all this was treachery done on design to deliver up our army to Cromwell ; some laying it upon Lesley, and others upon my uncle. I am persuaded there was no treachery in it : only Waristoun was too hot, and Lesley was too cold, and yielded too easily to their humours, which he ought not to have done."¹

Cromwell marched into Edinburgh. During the year which passed between the battle of Dunbar and the battle of Worcester, Nicolson was often in attendance on the King. When appointed Lord Advocate he had been, for many years, a strong Covenanter. But now his views were, to some extent, changed. He had recently married the daughter of Robert Burnet of Crimond, who appears to have induced him to support Charles against those who wished to use the King's extremity as an opportunity for extorting fresh concessions, or inflicting additional humiliations.² But the royal cause was hopeless ; and when, on the anniversary of Dunbar, the battle of Worcester followed close upon the capture of Dundee, the official arrangements of Scotland were completely upset, and the Lord Advocate, if in office at all, held his place by a very insecure tenure. In a short time he and all the other Officers of State were out of office, and Scotland was governed on an entirely new system.

The changes now made were of the most complete de-

¹ History of His Own Times, i. 74, 75.

² Bishop Burnet says, "My father had great influence on him" (Nicolson). History of His Own Times, i. 77.

scription. A Council of twenty-one persons, of whom Cromwell himself was one, was appointed to conduct the affairs of Scotland and Ireland, and the executive government in Scotland was intrusted to eight Commissioners, who sat in council at Dalkeith.¹ The Commissioners were General Monck, General Lambert, and General Dean, Lord St. John, Sir Henry Vane, younger, Colonel Fenwick, Mr. Soloway, and Alderman Tichborne. After a short time, Sir Henry Vane and Colonel Fenwick were sent to London, for the purpose of reporting to Parliament what had been done by the Council in Scotland. They stated that, among other measures, a proclamation had been issued prohibiting the exercise of any jurisdiction in Scotland, except under the authority of the Parliament of England. This was approved by the Council of State, and a letter was sent, in due time, to the Commissioners in Scotland, informing them that the Council had chosen Mr. Andrew Owen, of Trinity Hall, in Cambridge, Mr. George Smith, and Mr. Marsh of Gray's Inn, and Mr. Mosely, to administer justice in Scotland, and had advanced one hundred pounds to each of them for their travelling expenses, leaving it to the Government in Scotland to fix their salaries.²

The judicial system of Scotland was thus entirely changed. The Court of Session disappeared, and the Commissioners for the Administration of Justice to the People of Scotland took its place. The last sitting of the Court of Session had been on the 28th of February 1650, the disturbed state of the country and the English invasion having prevented the judges meeting again. The judges now appointed by the Keepers of the Liberties of England were directed to administer justice according to the laws of Scotland, and were authorised to remove such Sheriffs and Commissaries as

¹ Lamont's Diary, 20th Jan. 1652.

² Council of State, Whitehall, 6th April 1652; Act. Parl. Scot. vi. ii. 747.

they considered unworthy of office, and to appoint other persons in their places.

The first meeting of the new judges took place on the 18th of May 1652. They were seven in number,—the four Englishmen already named, and three Scotsmen, Sir John Hope of Craighall, eldest son of Lord Advocate Hope, William Lockhart of Lee, who had fought as a royalist at Worcester, but was soon to marry Cromwell's niece, and John Swinton of Swinton, whose brother had died at Worcester serving in the royal army. They sat together, and all causes were argued before the whole Court. Sir John Hope was President, but after his death, which took place in April 1654, the chair was taken weekly by each judge in turn. From time to time changes occurred in the composition of the Court. Owen was dismissed for preaching in Edinburgh. Marsh, also dismissed, became an advocate at the Scottish bar. Smith died while on Circuit at Inverness. Sir James Dalrymple, afterwards Viscount Stair became one of the Commissioners. Johnston of Warriston supplied one vacancy. Another was filled by the appointment of Andrew Ker, a judge of whom Wodrow mentions that "he used to say that many times he had as sweet and as great communion with God when on the bench, and the advocates pleading before him and the rest, sometimes, as ever he had in secret." In March 1660 a new commission was issued, but the judges named in it never sat. Scotsmen in London wrote to their friends in Edinburgh, telling them not to go to law before these judges, and to do all that could be done to discourage them. The Restoration was at hand. The judges themselves were at a loss to know under what authority they were to act. Some of them were for the King, others for the Commonwealth. The new commission was, therefore, never put into operation.¹

¹ Brunton and Haig, 345-347; Nicoll's Diary, 1st Nov. 1655; Lauderdale MSS.

During the Commonwealth the old title "Lord of Session" was at first dropped, and the Commissioners for the Administration of Justice were spoken of as "Judge Smith," or "Judge Hope." But soon the native term came to be used again. When a commission was prepared for Mr. Andrew Ker, he was described in the minutes of the Council of State as "one of the Commissioners assigned for the Administration of Justice to the people of Scotland, and one of the Lords of the *Sessions* there."¹

The leaders of the bar during this period were Gilmour, afterwards Lord President at the Restoration, Wedderburn, to whom Sir George Mackenzie has paid the highest compliment which can be paid to an advocate, "*Nihil autem ille in facto, nisi quod verum, nec in jure, nisi quod justum, pathetice urgebat,*" Dalrymple, afterwards Viscount Stair and President of the Court, together with Fletcher and Nisbet, both Lord Advocates after the Restoration. In 1654 the leading counsel, being called on to abjure royalty and take the Oath of Allegiance to the Commonwealth, withdrew from the Court. But they carried their point, the Tender was not pressed, and they returned to practice.

The "English Judges" were popular in Scotland. The arbitrary conduct of the Court of Session, and the fact that it was open to corrupt influences, had deprived it of the confidence of the country; but the new judges were careful and just. They were authorised by the Council of State to moderate their decrees, so as to give debtors time to make payment with interest, or to compel creditors to take land "at a competent rate," instead of money.² The Council itself was directed by the Protector to grant an indemnity, to such persons, in the Highlands, as were thought deserving, against all suits on account of thefts or robberies committed

¹ Lamont's Diary, 18th May 1652; Order of Council, Whitehall, 20th April 1658; Act. Parl. Scot. vi. ii. 766.

² Cal. State Papers (Domestic), 1654, 77.

during the wars.¹ "The English judges," says Sir Walter Scott, "whom he (Cromwell) appointed introduced into the administration of justice a purity and vigour with which Scotland had hitherto been unacquainted." Their decisions are preserved in a series of reports extending from November 1655 to February 1659. Although it has been said that the Protector's Government attempted sometimes to interfere with the decisions of the Court, yet we find, in the reported cases, that when the Government was itself a party, judgment was readily given against it.

From July 1650 till October 1652 none of the Criminal Courts sat; but the Commissioners for the Administration of Justice took the place of the Justice-General and his Deputes. These offices were abolished, and Parliament gave the new judges power to act in criminal as well as civil cases. At first a commission was issued in favour of Smith, Owen, Marsh, and Mosely, authorising them to exercise the powers of the Justice and Justice-Deputes. Sir John Hope, and Pearson, a well-known advocate, were afterwards added, probably at the request of the English judges, who were embarrassed by their ignorance of Scottish Criminal law. They issued a series of orders on the 8th of November 1653: that the "old session house" should be fitted up for the use of the criminal judges in Edinburgh, under the advice of the "Advocate-General;" that the judges should sit in scarlet or purple robes; that no trial should be put an end to except by order of the judges; and that the judges alone should have the power of imprisonment or release.²

The records of the Criminal Courts in Scotland during the Commonwealth are of the most scanty nature. Only one book is extant now, although for a long time after the

¹ Thurlow State Papers, iii. 97.

² MSS. Advocates' Library, 25. 2. 9, 584, 585.

Restoration a number of bundles, containing the proceedings of the criminal judges, were known to exist. These are now lost.¹ But the existing records afford some information of the way in which the English judges administered criminal justice. The trials for witchcraft, so long a blot on the criminal law of Scotland, continued to be held, but with less frequency than before. Bigamy was punished by a fine of five pounds, paid by the bigamist to his first wife. We find a Sheriff convicted of compounding privily for blood, and fined one hundred pounds, a sentence which was cancelled at the Restoration on the ground that "the pretended judges" had no jurisdiction. A prisoner who pleaded guilty to drinking the health of King Charles, and "uttering horrid oaths," was carried to the Correction House, whipped, and put to hard labour during the pleasure of the judges.

There seems to have been a standing feud between the criminal judges and the Magistrates of Edinburgh. Frequently the Magistrates were fined for not keeping the streets clean, for not attending the Court, and for not bringing prisoners from the jail for trial. On one occasion, when the fines amounted to fifty pounds, they presented a petition to the Court, praying to be relieved on the ground that they had now employed scavengers to clean the streets, and that they did not attend the Court because they had not received notice when it was to meet.

Circuit Courts were held in various towns. "Ther was a jurie of Englishes," says Lamont, "that satt att Stirling." This Circuit Court, held in September 1652, tried a number of strange cases, of which the least horrible were accusations against witches and adulterers. "As for the witches, they had libertie to goe home againe, vpon caution, till Apr. 1653; for adulterers, they were freed for 5 lib. sterl. a

¹ MSS. Advocates' Library, 25. 2. 8, 445, 446.

peice.”¹ Before the Commonwealth came to an end, the Circuits were in good working order, and the records which remain give a fair idea of what took place. For instance, the Court sat for two days at Stirling in March 1659. The presiding judges were “Judge Lawson” and “Judge Goodsir.” The roll of freeholders, whose tendency to absent themselves was a source of annoyance to the Court, was called; and the Justices of the Peace, many of whom were English officers, were in attendance. The calendar of crimes was not heavy. Twelve persons were fined forty pounds each for adultery. Three persons were sentenced to death, one for stealing a horse, another for stealing a cow, and the third for stealing a number of sheep. For petty thefts the punishment was a whipping. On the whole, there appears to be much truth in what is said by a chronicler, who declares, “The Englishes wer more indulgent and mercifill to the Scottis nor wer the Scottis to thair ain countrymen and nychtbouris.” Fines were often restricted, or remitted altogether; convicts were released from prison on evidence of good conduct; and offences which the Scottish judges had frequently deemed worthy of death were now punished by a flogging.

It was part of Cromwell’s plan of judicial reform for Scotland that the province of the inferior Courts should be defined and settled. “Baron Courts,” to sit once a month, were to be held for the trial of petty civil cases; and the office of Justice of the Peace was remodelled. Each justice, on his appointment, was sworn, before the Sheriff or two justices who had already taken the oath, to “do equal right both to rich and poor.” Quarter Sessions were to be held regularly in February, May, August, and October. The justices had the power of superintending the way in which the Sheriffs performed their duties; and information was to be

¹ Lamont’s Diary, Sept. 1652.

given to the Council of State, if any Sheriff failed to inflict adequate punishment for assaults to the effusion of blood, or, by collusion, permitted any delinquent to be acquitted. Sheriffs thus neglecting their duties were, upon information by the justices, "to be called, censured, and severely punished by his Highness' Council." The functions of the justices were numerous. They had special jurisdiction over rioters, with power to bind persons over to keep the peace, and issue warrants for their arrests if they did not obey. They were instructed to put in force the laws against beggars, and "idle men and women, without calling or trade, lurking in ale-houses;" to see that the roads and bridges were kept in repair; to punish destroyers of woods, and those guilty of petty thefts; to fix the price of labour; to inspect the jails; to rate parishes for the support of poor prisoners, and, generally, to enforce the poor-laws; to put in force the laws against Sabbath-breaking and profane swearing; to "take care that good and wholesome beer and ale be brewed in every shire." Besides all these duties, they were to cause persons accused of murder, or other heinous crimes, to be arrested; and, thereafter, to examine on oath all the witnesses. If they thought a *prima facie* case was made out, the accuser was to be bound over to prosecute, and the witnesses to give evidence. They might then commit the accused for trial, or liberate him on bail, after taking his declaration. The whole of the proceedings were to be reported to the next Quarter Sessions or Circuit Court, with the view of bringing the accused to trial.

But Cromwell's great scheme was an incorporating union between England and Scotland, on the footing that Scotland should have power to elect members to serve in "the Parliament of England."¹ This was resolved on in 1651, but the Protector's first Parliament of both nations did not

¹ Act. Parl. Scot. vi. ii. 772.

meet till the 4th of July 1653. There were then present one hundred and thirty-nine members from England and Ireland, and five members from Scotland. The five Scottish members were Sir James Hope of Hopetoun, Alexander Brodie of that Ilk, Swinton of Swinton, William Lockhart, and Alexander Jeffrey. A Committee, on which Hope, Swinton, and Lockhart acted, was appointed to consider the affairs of Scotland, and an ordinance for uniting Scotland to England, in one Commonwealth, was framed.¹ In June 1654 a report was presented to the Council of State, explaining the way in which it was proposed to settle the representation of Scotland in Parliament. Thirty members were divided among the counties and burghs of Scotland. With the exception of Edinburgh, no constituency had more than one member. The more populous counties, such as Midlothian and Perthshire, had each a member. Other counties were arranged in groups, as in the case of the shires of Dumbarton, Argyll, and Bute, which, united, returned one member. Of the burghs, Edinburgh stood alone, returning two members. All the other burghs were thrown into districts. Glasgow, for example, returned one member along with Lanark, Rutherglen, Rothesay, Renfrew, Ayr, Irvine, and Dumbarton.² This scheme was adopted, and an ordinance, giving it effect, was passed by the Protector. England had four hundred members, while Scotland had only thirty. Nevertheless, inadequate as the representation thus given to Scotland appears, the terms granted by Cromwell were quite as favourable as those obtained at the Union, half a century later.

In the Parliaments which met during the Commonwealth the influence of the Council secured that the members from Scotland were tractable persons, who would not go into

¹ Order of Council, Whitehall, 12th April 1654.

² Act. Parl. Scot. vi. ii. 753, 754.

Opposition. "All our Parliament men are chosen here," General Monck writes to Secretary Thurloe, "but you will know few of them but such as are English, . . . the rest are honest and peaceable Scotchmen, and I believe will be all right for my lord protector, which I thought fit to nominate, because they are not known to you."¹

One of the means by which Cromwell hoped to complete the Union was by assimilating the legal procedure of Scotland to that of England; and instructions were sent to the Councillors in Scotland, directing them to see that the proceedings in all the Scottish Courts of law should be "agreeable and according to the laws of England as fully as the same may be done." The clumsy expedient of furthering a union of the countries by transplanting the rules of English law into the Courts of Scotland was unworthy of the genius of Cromwell. It was not the first time that such a plan had been spoken of. In 1603, when a union was proposed, it was said that no union could take place unless the laws of the two countries were made the same. But the ablest man in England declared that "men love to hold their own as they have held, and the difference of this law carrieth no mark of separation," and strenuously denied the necessity of having a uniform legal system.² Cromwell's instructions, providing for the introduction of English forms into the Scottish Courts, were duly issued in March 1655; but the proposal came to nothing.

Of the sixty "Peers" who sat in Cromwell's House of Lords, three were Scotsmen,—the Earl of Cassilis, Sir William Lockhart, and Sir Archibald Johnston of Warriston. During the first years of the Commonwealth, Johnston had protested against the usurpation, and had spoken and written strongly against Scotsmen who held office under Cromwell. But the

¹ Thurloe State Papers, v. 366.

² A Preparation towards the Union of the Laws of England and Scotland.—Bacon's Works (ed. 1824), iv. 287-304.

Protector, aware of Warriston's influence and ability, made great efforts to seduce him from the King's party. In 1657 he gained his point. Warriston had been requested, by a meeting in Edinburgh, to go to London on public business. He refused, and begged not to be sent. "With great ingenuity," says Wodrow, "he acquainted them with what he thought was his weak side, and that he was sensible of the easiness of his temper, and that he could not resist importunity, and begged he might not be sent among snares; but after all he was peremptorily named." He went to London. The bait which Cromwell held out to him was his former office of Lord Clerk Register. The temptation was great. His family was large; he had failed to recover heavy arrears of salary which were due to him; he had advanced money for the public service, which had not been repaid. "Thus," says Wodrow, "when no other way appeared to recover what was justly his, he was through importunity prevailed upon to fall in with the usurper, there being now no other door open for his relief. Thus he fell before the temptation, that all flesh, even the best, may appear to be grass." He was appointed Lord Clerk Register in July 1657; and by the end of that year many of the public records of Scotland, which had been taken to London in 1651, were returned.¹

as . In Cromwell's Upper House Warriston was not popular, of tippears from a conversation which Sharp had with one Sharp, e Peers of the Commonwealth. "He came," says 'we hav' "to speak about Warriston. 'This day,' said he, much to e had an hour's speech of Warriston. We have not him. He do in our House, and it spends our time to hear he is alway would be a fit mcmber of the Lower House, for he's speaking.' I told him I had heard of War-

¹ Wodrow, His Diary, March 1651.

st. (ed. 1829), iv. 361; Thurloe State Papers, vii. 537; Lamont's

riston's declarations against valentines, and a stage-play lately acted by Sir William Davenant. He laughingly said, 'We have some such stories now and then.' He made long and tedious speeches from voluminous notes, and it was said of him, in London, that while none of the Scottish members ever spoke in the Lower House, he was always speaking to little purpose in the Lords'.

Before Warriston went to London Sir Thomas Nicolson had died. "Upon the 15 day of December 1656, Sir Thomas Nicolsoun, Advocat to the lait King and Estait, ane excellent and judicious lawer, depairtit this lyff, to the greiff of mony in the land."¹ Nicolson had not held office under the Commonwealth. From 1652 till 1658 the history of the office of Lord Advocate is very difficult to trace. Henry Whalley, an Englishman, and Judge Advocate to Cromwell's army, appeared, for some time, on behalf of the Commonwealth in the Criminal Courts; and in the Civil List of Scotland, sent by Broghill to Cromwell, there is an allowance of two hundred a year to the "Advocate-General." In 1653, the Council of State at Whitehall passed an ordinance, "that the judges in Scotland, and the commissioners for confiscated estates and customs, or any five or more of them, do constitute and appoint a fit and able person to be Advocate for the Commonwealth in Scotland, and that they do settle and allow him such salary, in consideration of his pains and service in that employment, as they shall think fit."² But no appointment of an Advocate was made at that time, and Whalley appeared in Court for the Commonwealth till 1655. On the 5th of June 1655 the name of "Mr. Robert Pittilloch" appears as Solicitor-

¹ Nicoll's Diary. "This yeare," says Lamont, "diuers persons in Scotland died very suddenly. . . . S^r Thomas Nicolsone, the Kings Aduocate, was in the Kirke on the Sabbath, att Edenb., and died on the Tuesday following in Dec."—Lamont's Diary, 1656.

² Order of Council, 16th June 1653; Act. Parl. Scot. vi. ii. 750.

General on the record of the Criminal Court, and a salary of one hundred pounds is allowed for "the Solieitor for the State" in the Civil List of that year.¹ This state of uncertainty ceases, however, in 1658, when Sir George Lockhart of Carnwath was appointed Advocate to the Protector.

Lockhart was the second son of Sir James Lockhart of Lee, who, in 1649, had been deprived of his seat on the bench for joining the Engagement for the relief of Charles, and had been confined in the town during the earlier days of the Commonwealth, but had regained his freedom through the influence of his eldest son, William, who had married the niece of the Protector. On the 8th of January 1656, George Lockhart was called to the bar by the Commissioners for the Administration of Justice; and, on the 14th of May 1658, he was appointed Advocate to the Lord Protector.² In Richard Cromwell's Parliament, "Colonel George Lockhart, his Highness' Advocate," is named as member for Lanarkshire. As we shall see, Lockhart survived the Revolution, and died in 1689. By that time he had gained the reputation of being the ablest counsel at the bar of Scotland. His eloquence was declared, by one of his compeers, to move his hearers as the harp of Orpheus had moved the stones, while his learning had led another to speak of him as a second edition of the *Corpus Juris*. But, in the meantime, his career as Lord Advocate was cut short when, in May 1660, Charles the Second was proclaimed at Westminster.

¹ MSS. Advocates' Library, 25. 2. 8, 453; Act. Parl. Scot. vi. ii. 895.

² Brunton and Haig, 419, 420.

CHAPTER VII.

THE RESTORATION.

THE Law Courts and the Privy Council of Scotland were changed from the days of Charles the First. The judges and the advocates, now for the most part timid or obsequious, were only too glad to be allowed to brush up their gowns, and go to Holyrood to kiss the hand of some royal favourite. The Privy Councillors and the Officers of State were equally corrupt. Sir Thomas Hope's place was filled by the fierce and haughty Fletcher; the unscrupulous and wily Primrose succeeded Johnston of Warriston as Lord Clerk Register; and, instead of Leslie, there was seen the savage face of Dalziel, unshaven since the death of Charles the First. The Scottish lawyers who lived at the close of the eighteenth century were a quaint group of men. We cannot admire some of their doings, much as we may respect their sound legal knowledge and their hard heads; but we can laugh sometimes at, and sometimes with, them. The old fellows sipping their port and munching their biscuits on the bench; their heavy Circuit dinners in the middle of the day, after which they returned to the hangings and transportations; Eskgrove showing things to be first "impossibill," and then "improbabill;" Monboddo slipping out of Court, "gown and all, to have a talk in the Outer House;" even the merciless Braxfield: are features in an amusing and instructive picture of manners. But it is otherwise with the lawyers of

the Restoration. No genial humorist, like Cockburn, could take pleasure in dwelling on their sayings and doings. Lawyers and politicians, they are all alike, cruel, avaricious ruffians. They are continually drunk, both at the Council table and at home. When the ghastly shrunken head of Montrose is taken down for burial, the Lord Advocate gives a feast in honour of the event, and one of the guests drinks himself to death. The Council Chamber reeks like a charnel-house. The air is tainted with the smell of blood. The grey hairs of Guthrie flutter in the breeze, and the townsmen tell each other that a drop of his blood fell on the Lord Chancellor's coach as he drove home from Court. The judges in a Circuit town drink the devil's health, at midnight, at the town cross. The common people whisper to each other gossiping tales of vice about their betters: Baillie has seduced Lady Cranston; Dundee has an intrigue with Sir George Mackenzie's wife; Sharp has arranged for the murder of his infant bastard. The doings of that Cabinet of statesmen who have steeped their brains in liquor, and their souls in guilt, startle even Charles amidst the pleasures of Whitehall. Their acts, he exclaims, are the acts of "madmen, or men who are continually drunk."

The new Parliament, which met on the 1st of January 1661, was in haste to restore to Charles the Second the power of which his father had been deprived in 1641, when the right of appointing the Officers of State was taken from the King; and the power of appointment, once more vested in the Sovereign, was declared to be an undoubted part of the royal prerogative, and an inherent privilege of the Crown. At the same time, all previous Acts of Parliament inconsistent with this Statute were repealed, as having been invasions of the prerogative.¹ The Ministers named on the rolls, under the old title of "the

¹ Stat. 1661, cap. 2.

Officers of Estate," are the Lord Chancellor, the Treasurer, the Lord Clerk Register, the Lord Advocate, and the Treasurer-Depute.¹

As soon as the King was firmly seated on his throne, there was a general scramble for places. "Most of the nobility," it is said, "and many of the gentry, and hungry soldiers, flew to London, just as the vulture does to the carcase." Middleton was first minister of the Crown in Scotland as Lord High Commissioner. The office of Secretary, "not of old esteemed much in Scotland," was given to Lauderdale.² The new Lord Advocate was Sir John Fletcher.

Fletcher had for some time been one of the busiest advocates at the bar. Our means of judging are scanty, but he appears to have shared with Nisbet of Dirleton the position of leading criminal counsel during the Commonwealth. He was engaged in many cases; and the short notes which are preserved of the legal points which he raised in defending his clients display remarkable ingenuity. But he owed his appointment as Lord Advocate mainly to the fact that he was a kinsman of the Lord High Commissioner. During the Commonwealth he had been suspected of corresponding with Middleton, and, along with Sir Archibald Primrose, had been reported to Government as a "notorious malignant."³ They were now rewarded. Primrose was made Lord Clerk Register, and Fletcher became Lord Advocate.

The appointment of Fletcher was most unpopular. Able men, who were his seniors in the profession, and who considered themselves his superiors in talent, were dissatisfied; and, in consequence, Middleton's government was disliked by the bar, a serious matter at that time.⁴ "Sir John Fletcher," says Kirkton, "was made King's Advocate, though

¹ Act. Parl. Scot. vii. 3.

² Mackenzie, Hist. 8.

³ Thurloe State Papers, v. 17, 18.

⁴ Mackenzie, Hist. 9.

he had been one of the first in Scotland who forswore the King, that he might find employment under the English. But partly by Middleton's procurement (of whose affinity he was), and partly because he was an honest man of the new mode (that is, a man void of principles), he was placed in that dangerous office, in which he had the opportunity to make all the subjects of Scotland redeem their lives, at his own price, from his criminal pursuit, upon the account of their old alleadged rebellions, and their late compliances with the English, in which himself had been a ringleader." ¹

In Parliament, on the 27th of February 1661, the Royal Commissioner produced a patent under the great seal appointing Sir John Fletcher his Majesty's Advocate for life. The patent having been read to the House, the new Lord Advocate took the oaths, and the Commissioner handed to him the patent, which he received kneeling.²

In the reign of terror which now began, the office of Lord Advocate was one of great power. Every one chose a patron. Some sought the Chancellor's favour; others went to the Clerk Register; but it was to the Advocate that most assiduous court was paid.³ "Most of all," we are told, "Sir John Fletcher, the new Advocate, was courted with vast soumes. He used a sett form of speech, by which he made people understand they behooved to give him money, which was so very common in his house, that when poor gentlemen had sent their servants to his house with a load of money, which was the ordinary present, his wife would command the bearer to throw it down upon the floor, as if it had been coals or billets for the fire; but within four years it became more precious in that house, however very much was given among those who had power either to sell favour or pervert justice." Fletcher took bribes without scruple for the purpose of spending them without thought. He

¹ Kirkton, 66.

² Act. Parl. Scot. vii. 44.

³ Kirkton, 80.

was not grasping for the sake of making money, but in order that he might indulge in every species of luxury and display. He was of a type common at all times, and to all parties, in the political history of Scotland, "a bold and fierce man, who hated all mild proceedings, and could scarce speak with decency or patience to those of the other side."¹

At the trial of Argyll the Lord Advocate had soon an opportunity of displaying his truculence. No complete or authentic record of this celebrated State trial is now in existence; but enough is known to show how Lord Advocate Fletcher conducted the prosecution. He was extremely anxious to convict Argyll. The story went that he had prepared no less than thirty different indictments before he was satisfied; and at the trial he was, as Baillie complains, "sometymes uncivilie tart" to his victim.² The main charge against Argyll was "compliance" with Cromwell. Fletcher had himself taken the Engagement during the Commonwealth. When the Marquis was defending himself, he alluded to this fact, and asked what he was to think, "after a man so eminent in the law as his Majesty's Advocate had taken the Engagement?" At this the Lord Advocate lost his temper, and exclaimed that the Marquis was "an impudent villain." Argyll replied that "he had learned in his affliction to bear reproaches; but if the Parliament saw no cause to condemn him, he was less concerned at the King's Advocate railing." The prisoner's counsel, one of whom was Mr. George Mackenzie, afterwards "the Bloody Mackenzie," asked leave to record the protest usually received from counsel in cases of treason, "that what should escape them in pleading, either by word or writ, for the life, honour, and estate of their client, might not thereafter be obtruded to them as treasonable;" but the Lord Advocate persuaded the Parliament to refuse this request, and the

¹ Burnet, History of His Own Times, i. 144.

² Letters and Journals, iii. 465.

advocates were informed that they were to plead "at their hazard."¹ The crowning iniquity, however, was the mode in which a conviction was obtained. The Crown could not have succeeded on the evidence which had been produced, and against which the accused had an opportunity of defending himself. That evidence had been heard, and Parliament was about to consider the case, when "one who came post from London knockt most rudly at the parliment door," and a packet of letters, written by Argyll to Cromwell during the Commonwealth, was handed in. The letters were read to the House, and, as is well known, clearly established the fact of Argyll's compliance with the usurpation. To read the letters was illegal. The Lord Advocate had closed his case; no further evidence should have been allowed; and thus the conviction of Argyll was a gross miscarriage of justice. To reward Fletcher for what he had done, the Estates, on the 12th of July, recommended the King to bestow on his Advocate some special mark of favour.²

A few days after Fletcher received this compliment from Parliament, George Lockhart did penance for his conduct during the Commonwealth. He was Lord Advocate to the Protector when the Restoration took place. He had now to crave admission to practise as an ordinary advocate, and, on his knees, to acknowledge that he had done wrong in coming to the bar during the usurpation. The graver offence of holding office under Cromwell was forgiven him, out of favour to his father, who, deprived of his judgeship in 1649, was now re-appointed to the bench, and made a Privy Councillor by Charles.³

Parliament had restored to the King the right of appointing the King's Advocate; and the holder of the office was again admitted to speak and vote as a member of the

¹ Wodrow, i. 135; Mackenzie, Hist. 36.

² Act. Parl. Scot. vii. 336.

³ Brunton and Haig, 420, 320.

House, without election: a privilege which was enjoyed by his successors until the Union. He was also permitted to have in attendance on him in the House a servant, to whom the sum of twenty-five pounds was allowed as wages.¹

It appears that a dispute arose, at this time, between the Lord President of the Court of Session, the Lord Clerk Register, the Lord Advocate, and the Treasurer-Depute, as to the precedence due to their offices; and a Committee was appointed with power to call these officials, hear what each had to say, and report to the House.² The Committee stated, in their report, that they had searched the records of Parliament, and had found that the order of precedence was: the President first, the Clerk Register second, the Advocate third, and the Treasurer-Depute last. The Clerk of the Register, the report said, and the Advocate had been Officers of State before the Treasurer-Depute. In 1482 the Clerk Register was enrolled as an Officer of State in the records of Parliament. In 1612 the Treasurer-Depute was named for the first time as an Officer of State; and at that time the Clerk Register and the Advocate were ranked before him. In 1617, when James the Sixth fixed the number of the Officers of State, the Clerk Register and the Advocate were again named before the Treasurer-Depute. In 1623, an Act of Secret Council was passed, when a positive rule was laid down for ranking the Officers of State in all time coming; and the Clerk Register and Advocate were then placed before the Treasurer-Depute. In consequence of this report, an Act was now passed, ranking the officers in question in the order recommended by the Committee.³ When this was done, the Treasurer-Depute was much aggrieved, and laid on the table a paper which still remains on the records of Parliament.

¹ Act settling the orders in the Parliament House, Mait. Club. Miscell. iii.; Minutes of Parliament, 12th July 1661; Act. Parl. Scot. vii. Append. 85.

² Act. Parl. Scot. vii. Append. 62.

³ Stat. 1661, cap. 211; Act. Parl. Scot. vii. 200.

It is a curious document. Of the Lord President and Lord Advocate he remarks, that, as they have "linked themselves to the Register" he is contented to leave them so united. The Lord Clerk Register's argument from the "ancientness" of his office he disposes of by saying, "Clerks are certainly of longer standing than Registers, for without Clerks we should have no Registers." He alludes, in an irrelevant way, to his ancestry. His ancestors before him, he says, have been Officers of State for one hundred and twenty years, except his father, who, he pathetically mentions, "dyed young, in the service of King James of blessed memory." The protest ends with a statement which throws some light on the unhealthy state of matters at the bar at this time. No counsel has appeared for him, he says, "the power of these worthy persons now in competition with him being so great, that all helps are obstructed, for neither lawyer nor writer will consult or appear on his behalf."¹

The two great measures of the year 1661 were the Act Rescissory, which repealed all Statutes passed since 1640, and the Act concerning the Church, which left it to the King to settle the form of church-government.² The idea of the Act Rescissory was first mentioned as a joke among the Lords of the Articles, and was afterwards agreed to at a meeting when few of them were sober. The Act concerning the Church was the result of a deep-laid scheme for the introduction of Episcopacy, in Scotland always the willing servant of arbitrary power. Fletcher did not take a prominent part in passing the first of these Statutes; but he was one of those whom Middleton consulted before he introduced the second. The Councillors who decided the

¹ Minutes of Parliament, 14th May 1661. The dispute as to the offices of Clerk Register, Advocate, and Treasurer-Depute was not settled for a long time. Protest by the Lord Treasurer-Depute, 11th Sept. 1672; and by the Lord Advocate, 28th July 1681.—Act. Parl. Scot. viii. 99, 234.

² Stat. 1661, cap. 15, 16.

momentous question of the church-government of Scotland were, besides the Commissioner himself, four in number: Sir Archibald Primrose, astute, wary, and unscrupulous; Sir George Mackenzie of Tarbet, the "passionate cavalier," whose voice was loudest for the Act Rescissory; Sir John Urquhart, whose hereditary madness afterwards drove him to suicide; and Lord Advocate Fletcher, the "inquisitor-general," whose cruelty could be averted only by a bribe. They met in private. Middleton explained the King's wishes, and told them, in plain language, that Charles was impatient to see Episcopacy restored. He said he thought Parliament would do it; what did they think? The advice of Primrose was in keeping with his character. The Bishops should be introduced "strongly, but slowly." "If you advance strongly," he said, "you keep yourself in favour; if slowly, you continue your employment; whereas, if you have soon done, you lose your power." Middleton said he would prefer to please his Majesty, "and do his business at one stroke." Mackenzie, Urquhart, and the Lord Advocate agreed with Middleton.¹

The fate of the Church was now in the King's hands. Middleton and Lauderdale gave different advice. Middleton said that the people of Scotland wished for Episcopacy. Lauderdale warned the King that this was not the case. The advice of Middleton prevailed; and the foundation was laid of that huge system of tyranny under which Scotland groaned till the Revolution. The Lord Chancellor explained to Lauderdale that it was intended to establish merely a modified form of Episcopacy. "My lord," said the Secretary of State, "since you are for Bishops, and must have them, Bishops you shall have, and higher than ever they were in Scotland." Episcopacy was again established; and at once nearly four hundred ministers declined to retain their bene-

¹ Kirkton, 95, 97.

fices by acquiescing in the appointment of Bishops. They were ejected from their livings, and became subject to the rigorous laws which, in accordance with the spirit of those days, were enacted against nonconformity.¹ For the next quarter of a century, the Lord Advocates were the chief instruments of government during a period when, in the words of the most impartial of historians, "the worst system of constitutional laws, administered by the worst men, left no alternative but implicit obedience or desperate rebellion."²

Middleton had pleased Charles by passing the Act Rescissory and the Act concerning the Church. In the session of 1662 he was not so fortunate. The Billeting Act and the Act of Fines proved his ruin. By the first of these Statutes twelve persons, named by ballot, were to be declared incapable of serving the King. Each member of the Estates was to write, on a "billet" or voting-paper, the names of the twelve persons he wished to exclude from office. The Clerk Register was to stand at the foot of the throne with a bag, into which the voting-papers were to be put; and, after the votes had been counted, the papers were to be burned. "All which form," says Sir George Mackenzie, "was thereafter punctually observed, only the Register, having a rooted quarrel against Southesk, did mark his billet with a nip, when he received it, and thereby discovered his vote."³ By the Act of Fines, a list of noblemen and gentlemen was prepared, who were to be fined in large amounts of money. The reason given was that the fines would go to reward those who had been faithful to the royal cause; but it was notorious that Middleton and his friends would secure most of the plunder. The object of the Act of Billeting was to deprive Lauderdale of the place of Scottish Secretary. He

¹ Laing, *Hist. Scot.* iv. 30-32.

² Hallam, *Constitutional History*, chap. xvii.

³ Mackenzie, *Hist.* 75.

was a Covenanter, but one who could not be excluded from office by mere tests, for he had already said that he would sign a cartful of oaths before he would lose his place. Though living in London, he was in constant correspondence with Edinburgh: a precaution necessary at a time when a minister's chief enemies were those in the same Cabinet with himself. He knew what was going on in Scotland, and took means to secure the confidence of Charles.

After Parliament rose the Privy Council met at Glasgow, and issued a proclamation that all Presbyterian clergymen who did not submit to ordination from a Bishop were to be instantly deprived of their livings. Their parishioners were, at the same time, forbidden, under severe penalties, to listen to their sermons. This was Middleton's last important act of administration. "He and all about him," says Burnet, "were at this time so constantly disordered by high entertainments and other excesses, that, even in the short intervals between their drunken bouts, they were not cool or calm enough to consider what they were doing." On the day when the Glasgow Act was framed, the members of the Privy Council were so drunk that they hardly knew what was going on, and could merely stammer that the law must be obeyed.

The King heard of these transactions. It was pointed out to him that the Act of Fines, if put in operation, would have the worst effects; and he accordingly sent down a proclamation extending the time within which the fines could be paid. Middleton, who wished to have some of the money in his own pocket, did not publish the proclamation at once. Charles was irritated at this; and Lauderdale made use of Middleton's folly to advance his own interests. Mackenzie of Tarbet, returning from a visit to Court, warned the Commissioner that his influence was waning. Middleton, on hearing this, started for London, accompanied by the

Lord Advocate and others of his party. "Thair is no dout," says a chronieler of the time, "bot as they went up for the Kinges Majesteis honor and service, so had thai thair awin endis; and, in thair travellis to Court, thair fell out great stormes of rayne, wind, thunder, lychtning, procuring the death of sum, and of the cornes and fruites of the ground."¹ But worse stormis awaited them at Court. Middleton was coldly received, and the King reprimanded him severely for his conduct regarding the Act of Fines. The Court was a scene of intrigue between the Scottish ministers. The rivals were unequally matched. Middleton was a soldier, brave but coarse. Lauderdale was a courtier, skilled in the arts by which Charles was to be won. Middleton attempted to make friends among the nobles of England. Lauderdale paid court to the mistresses of the King. Middleton said he scorned to "be pimp to any prince in Europe." Lauderdale went upon his knees to Mrs. Palmer. Middleton drank deeply and talked foolishly. Lauderdale heard all, promised secrecy, and told everything to the King. Charles gave no sign of his intentions, till, when the meeting of the Scottish Parliament was close at hand, he suddenly discarded Middleton. Rothes was made High Commissioner, and the management of Scottish affairs was put into the hands of Lauderdale.

Middleton did not at once resign all his appointments; nor did Fletcher cease to be Lord Advocate at the time of his patron's fall. He remained in office for some time, although his influence was entirely at an end.

Lauderdale went to Scotland for the meeting of Parliament, leaving the transaction of Scottish business in London in the hands of Sir Robert Murray, whose great achievement at this time was the invention of a cipher, of which

¹ Nicoll's Diary, Oct. 1663.

Lauderdale declared he could make neither head nor tail, even with the key.

On the 18th of June the Estates met, and the Secretary found his hands full. "Dear Robin," he wrote to his under-Secretary, "no dog leads so busy a life. Torment of visitors, in crowds, not companies; and incessant meetings; no sleep or time to write, and nothing like recreation, makes me a very slave. . . . I am perfectly dazed."¹ The Billeting Act and the Act for excepting persons from Offices of Public Trust were repealed. Lauderdale himself had been billeted; and so resolved was he that all memory of the fact should be lost, that he was furious with Primrose for printing even the titles of the hated Statutes. "This is an injury," he wrote, "both to the persons who are billeted, and a greater injury to your lordship, for there you print the title of two dead damned things, of which I am sure you can give no extract, unless a new Parliament receive them."²

This Parliament saw the close of Warriston's career. At the Restoration no man in Scotland was in greater peril. The Bishops hated him, as the foremost of the Covenanters. He had taken office, moreover, under Cromwell. But another circumstance, which had occurred when Charles was in Scotland, was the chief cause of danger. Warriston was a man of austere morals, of deep personal piety, and of a stern sense of duty. In an unlucky moment his conscience whispered to him that he ought to remonstrate with Charles on account of his debaucheries. His friends, even his private chaplain, tried to prevent him doing so. It was in vain. He spoke to the King about his vicious life. Charles pretended to take what was said in good part; but he never

¹ Lauderdale MSS.

² The King's Letter to the Estates, 4th June 1663, and the Answer of the Parliament, 28th July; Commission for trying of the contrivance and carrying on of the Act of Billeting; Lauderdale to Primrose, 6th Feb. 1663, Kirkton, 168.

forgot or forgave what Warriston had done.¹ On the 14th of July 1661 orders were sent to Scotland for the arrest of Warriston, Sir James Stewart, then Provost of Edinburgh, and Sir John Chiesly of Carsewell. Stewart and Chiesly were at once seized. Johnston had a narrow escape. He was riding into Edinburgh, on his return from a visit to the country, when the news met him of the arrest of the Provost and Chiesly. He turned his horse's head, galloped off, and reached a hiding-place.² Proclamations were issued making it treason to harbour him, and offering a reward for his arrest. But he was not found. His family was in deep distress; and Lady Johnston presented a petition to the King, begging mercy for her husband. "Your petitioner," she said, "and her twelve children, being reduced to a poor and desolate condition, know not what hand to turn themselves for comfort or support. Therefore your Majesty's petitioner doth, in her own, and her husband's, and children's names, humbly beg your Majesty may be graciously pleased to grant him your royal pardon for whatsoever he hath done amiss, and allow him to live at home, privately, in safety with your petitioner, under your Majesty's gracious favour and protection, as far as concerneth any offence committed in those late times against his duty to your Majesty's public concerns."³ To this piteous appeal Charles turned a deaf ear. The search for Warriston was continued; but he escaped in disguise to Hamburg. On the 1st of February 1661 the Lord Advocate produced in Parliament a summons of treason against him. He was called at the bar, but did not appear. The summons, a lengthy document charging him with compliance with Cromwell, was read to the House; and, on a subsequent day, sentence of forfeiture was pronounced against him. At the Market Cross of Edinburgh,

¹ Wodrow, i. 361 (ed. 1829).

² *Ibid.* 355.

³ "The Humble Petition of Helen Hay, Spouse to Sir Archibald Johnston of Warriston."—Lauderdale MSS.

where he had so often stood among the victorious Covenanters, Warriston was proclaimed a traitor by the Lyon King-at-Arms and his heralds, who tore his Arms asunder, and trampled them under foot. He was specially excepted from the Act of Indemnity passed in the course of the same year.¹

It was known that Warriston had left Scotland ; but the Government did not relax its efforts to secure him. After remaining some time at Hamburg he went to France. A spy was employed to watch Lady Johnston, who was traced to Rouen, where Warriston was discovered. At the moment of his arrest he was kneeling in prayer. He was sent to London, and thence by sea to Edinburgh, where he was confined in the Tolbooth.

It was on the 8th of June that Warriston was lodged in prison ; and on the 23d the Privy Council met to consider a petition which had been presented by his family. It stated that he had lost his memory, and almost his senses, and besought delay only that he might be in a fitter state to die. Persons who had seen him corroborated the statements of his wife and children. But the Council decided that he must be brought before Parliament at once.² On the 8th of July he was brought up to be sentenced in terms of the forfeiture which had been pronounced in 1661. Being asked if he had any reason to give why he should not be executed, he answered, in a voice broken by sobs, that "his memory was lost, that he remembered neither matter of law, nor matter of fact, nor a word of the Bible," and begged delay in order that ministers and physicians might prepare him for death.³ There was some pity felt ; but not a voice was raised against his execution. The only question was

¹ Act. Parl. Scot. vii. 26 ; Append. 66, 67, 69 ; Nicoll's Diary, 13th May 1661.

² Lauderdale to Murray, 23d June 1663.—Lauderdale MSS.

³ Lauderdale to Murray, 10th July 1663.—Lauderdale MSS.

when it should take place. Some, moved by compassion, would have given him a month; others thought a fortnight was enough. The Bishops, it is said, proposed that he should die on the 23d of July, the day on which, in 1637, the reading of the Service-book had been interrupted in St. Giles'. The House divided, and, by a majority, it was decided that, on that day fortnight, he should be hanged, and his head fixed on one of the city gates. This sentence he received with calm dignity.

Warriston's friends implored Lauderdale and Rothes to ask the King to delay the execution. Lauderdale had been the personal friend of Warriston; but he knew that the sentiment which Charles felt was not merely the enmity of a King to a rebellious subject, but the personal hatred of one man against another. Both he and Rothes refused to do anything in the matter. "We durst not," wrote Lauderdale to Murray, "offer anything to his Majesty, nor would I promise to write so much as to you in that business. Yet I must needs tell you something there was of compassion in the Parliament, when they granted fourteen days' time for the prisoner to prepare himself to die. And when the sentence was pronounced, his carriage pleaded much better than anything I could have expected. For he received the sentence to be hanged, and to have his head affixed, with much more composedness than I did expect. He sat on his knees, according to the custom; and then prayed God to bless the King, to bless the Parliament, to keep every man from his condition. And again he prayed for the King, for the Church, and for the Kingdom, and, without one word for himself, he went out. Discretion, and duty not to offer anything to his Majesty in such a case, makes me that I will say no more."¹ The morning after this letter, evidently composed under the excitement of the emotion caused by

¹ Lauderdale to Murray, 9th July 1663.—Lauderdale MSS.

the scene at Warriston's condemnation, was written, Lauderdale again wrote to Murray, saying that he had written these "three or four insignificant lines about Archibald Johnston" at Burnet's request, and adding, "You will, I think, be as shy as I am in moving his Majesty in the matter." This hint was not lost on Murray. Johnston's family sent a petition for delay to Charles. He duly received it; but no one at Court ventured to mention the subject of Warriston's execution.¹

Johnston's health had failed on the Continent. It was said he had received a dose of poison at Hamburg. His nerves were shaken and his memory almost gone. But before his death he recovered, and was able to prepare a speech, to be read at the place of execution, in which he lamented having taken office under Cromwell, but denied that he had any share in advising the execution of Charles the First. At two o'clock on the 22d of July he was taken to the Cross of Edinburgh. The Commissioner was not present. He was at Leith, where a gay company of gentlemen archers were shooting on the Links. But a dense crowd stood round the scaffold. When Warriston was reading his speech, a royalist, who stood on a staircase near, called out, "Stop him, he's talking treason!" The mob burst into a shout of laughter; but Warriston read his speech to the end. He then prayed fervently, and ascended the ladder. The hangman adjusted the rope, and asked him if he was ready. He said he was, and was dropped, exclaiming, "Oh, pray, pray; praise, praise!" His last speech was printed, sold in large numbers, and read all over Scotland, although the Privy Council passed an Act against it, and sent officers to search the booksellers' shops, and seize all the copies they could find.²

¹ Murray to Lauderdale, 14th July 1663.—Lauderdale MSS.

² Mackenzie, Hist. 134, 135; Wodrow, i. 357-359; Lamont's Diary, 22d July 1663; Nicoll's Diary, 22d July 1663. "On Wednesday Archibald Johnston was

The career of Lord Advocate Fletcher was soon cut short. He fell a victim to his own rapacity. Accusations of taking bribes, and other misdemeanours, were brought against him. The Privy Council considered his explanations unsatisfactory; and it was thought he would at once resign. For some time, however, he continued to defend himself. He was permitted to go to London. There too he failed to meet the charges brought against him, and accordingly resigned. "Sir John Fletcher, the Advocate," says Kirkton, "was turned out of his office for bribes and other miscarriages, and little richer he was than when he entered into his terrible employment, notwithstanding all the vast sumes he hade extorted from honest people, who, fearing his power and mallice, were glade to buy his friendship at a very dear rate." He retired to his estate of Cranston. His patron, Middleton, had died in exile; but Lady Middleton found a home, and ended her days at Cranston, where Fletcher was living on what remained of his ill-gotten gains.¹

No time was lost in appointing a successor to Fletcher. Sir John Nisbet of Dirleton had been Lauderdale's adviser for some time; and on the 3d of November his patent as Lord Advocate was recorded in the books of the Privy Council.

Nisbet came of a legal stock. His father, Sir Patrick Nisbet, was a judge, and was descended, on his mother's

hanged at the Cross of Edinburgh, according to his most just sentence. His speech at his death was stark staring nought. He did read it out of a paper, which, when he had done, the Bailly took from him, and I saw it under his hand. You shall have it by the express, who shall be despatched once on Thursday, God willing."—Lauderdale to Sir Robert Murray, 28th July 1663, Lauderdale MSS.

¹ Wodrow, i. 418; Rothes to Lauderdale, 26th May 1664, Lauderdale MSS.; Kirkton, 205; Lamont's Diary, Sept. 1666. Lord Advocate Fletcher's resignation has been preserved: "I, John Fletcher, do most cordially and freely resign, and give up in your Majesty's hands, my office of being your Majesty's Advocate in the Kingdom of Scotland, granted to me under the great seal thereof, to be disposed of in favour of any other person your Majesty shall think fit, By these presents written and subscribed with my hand at Holy Rood house the fourteenth of September 1664."—Lauderdale MSS.

side, from Sir Thomas Craig of Riccarton.¹ Sir John had come to the bar in the eventful year 1633. Soon after his call he had the good fortune to be retained as one of the counsel for Balmerino; and in the legal discussions which arose during the trial of that nobleman he took a conspicuous part. Six years after, he was appointed Sheriff-Depute of Midlothian.² In 1641, when the Estates directed Lord Advocate Hope to prosecute Montrose on the curious charge of treason committed along with the King, Montrose petitioned Parliament to order Nisbet to plead for him, along with Sir John Gilmour and Sir Lewis Stewart.³ During the Commonwealth he had a large practice, and made a fortune. Soon after the Restoration he married a daughter of the house of Pitmilley, and bought the estate of Dirleton.⁴

On his appointment as Lord Advocate, Nisbet was raised to the bench as Lord Dirleton, and was the last person who combined the offices of Lord Advocate and judge of the Court of Session.

The new Lord Advocate plunged, without a scruple, into the troubled waters. "These men," says Kirkton, "bore always worse and worse. About this time Sir John Nisbet was made Advocate in place of Fletcher, a man of far more dangerous temper; for money might sometimes have hired Fletcher to spare blood, but Nisbet was always so sore afraid of losing his own great estate, he could never, in his own opinion, be officious enough to serve his cruel masters." The laws under which he acted gave ample

¹ Sir Patrick Nisbet of Eastbank, third son of James Nisbet and Margaret, sister of Thomas Craig of Riccarton, was raised to the bench in 1636.—Brunton and Haig, 295.

² Brunton and Haig, 389.

³ Balfour, *Annals*, iii. 22; Baillie, *Letters and Journals*, i. 382; Hill Burton, *Hist. Scot.* vii. 142.

⁴ "It stood him a great sowme of money, and was looked on as a great bargain and purchase at that tyme."—Lamont's *Diary*, August 1663.

scope for the display of this base and mercenary spirit. It is useless to mention all the laws against the nonconformists of Scotland which stained the rolls of Parliament during this period. The Act against Conventicles forbade, under fearful penalties, a religious service to be held in the open air.¹ It was made an offence to be frequently absent from the parish church.² These Statutes and many others, along with proclamations and Acts of the Privy Council, were printed on broadsheets, posted up on the highways, and hawked about the country, in the hope of awing the people into conformity with the State Church.

But the way in which these laws were enforced was worse than were the laws themselves. For some time the penal Statutes against the nonconformists were administered by the Justice Court and the Privy Council. The Lord Advocate prosecuted, and the forms of the common criminal law were, to a certain extent, observed. But in 1664 a dark, though short, chapter in the history of our criminal law began. The Court of High Commission was established. The lay members of the Government in Scotland had not been harsh enough to please the Bishops. Sharp went to London and complained about the conduct of Lord Chancellor Glencairn. He declared that the Established Church could not be maintained "unless some more spirit was put into the administration," and proposed that a Special Commission should be appointed to administer the penal laws against nonconformity. To this plan the King agreed, and granted a commission to the Primate himself, to Glencairn, and forty-two other personages, authorising them to call before them, when and where they should appoint, all nonconformists, whether Papists or Presbyterians, who preached without a Bishop's licence, or heard sermon

¹ Stat. 1670, cap. 5.

² Stat. 1663, cap. 2.

anywhere except in the parish church. The Commissioners could arrest and fine whom they pleased; and a general authority was given them "to do and execute what they shall find necessary for his Majesty's service." Any five of the Commissioners could act, provided a Bishop was present, and there was no appeal from their judgments. Such was the Court of High Commission. Its proceedings are notorious. All law and order were disregarded. The Lord Advocate ceased to act as Public Prosecutor, and became a member of this iniquitous tribunal. No indictments were required; no defences were allowed; no witnesses were necessary. The accused were dragged before the Commissioners, and compelled to answer any questions which were put to them, without being told of what they were suspected. The Act of Fines was revived, by a royal mandate, in violation of the Constitution, and it was decreed that fines should be exacted from all those whom the Treasurer or the Lord Advocate named. The laymen could not tolerate the atrocities which the prelates wished to commit; and the Court of High Commission existed for only two years. But in these two years enough had been done to breed throughout Scotland a spirit of desperate opposition to the measures of the Government.¹

The first serious act of armed resistance by the Presbyterians was the affair known as the Pentland Rising, which took place in November 1666. This mad attempt at rebellion was speedily crushed, and the prisoners were tortured and executed. But the Government was determined that punishment should reach those who had escaped. Accordingly, on the 15th of August 1667, the Lord Advocate pro-

¹ Burnet, *History of His Own Times*, i. 301; Commission for executing the Laws in Church affairs, Whitehall, 16th January 1664; Wodrow, i. 384-394; Nicoll's Diary, January 1664, where a copy of the High Commission will be found, collated by the Editor with two old transcripts among the Wodrow MSS. in the Advocates' Library.

duced, in the Justice Court, an indictment against fifty persons, who were charged with being concerned in the Pentland Rising. They did not appear for trial, and sentence of outlawry was pronounced against them. The Lord Advocate then moved that the case should be tried in absence, the verdict of a jury taken, and sentence of death passed upon the outlaws. The judges of the Criminal Court hesitated. The procedure which Nisbet demanded was novel, if not illegal. But he had previously taken the opinion of the Court of Session, and had obtained a favourable answer. This opinion he now produced, and the Justice-General, the Justice-Deputes, and their assessors, bowed to the decision of the Court of Session. The Lord Advocate chose certain of the cases for trial. The accused were found guilty, and sentenced to death in absence. There were loud complaints about what had been done. The reasons which induced the Court of Session to gratify the Lord Advocate, by declaring trial in absence to be legal, have been stated thus: "First, the authority of the Roman law, our highest authority in all matters, and referred to, in this instance, by the Statute 1540, c. 69, which declares the Sovereign's right to pursue all summons of treason, 'conforme to the *common law*, gude equitie, and reason.' Secondly, the reason of the thing itself; inasmuch as it is absurd that the traitor should have a benefit, and the King be injured, by his contumacy, which is an aggravation of his fault. Thirdly, the practice of Parliament, who are in the use of trying for treason in absence; and who proceed in this way, not in their legislative capacity, but as the fountain of justice and the supreme Court of the land. Lastly, the analogy of the practice of trying traitors after their death, as allowed by the said Act 1540, c. 69; though the absence in that case is necessary, and not contumacious." These reasons, invented by the legal ingenuity of Dirleton,

convinced the judges; but they did not convince the public mind. It was found necessary to support the action of the Courts and the Government by the voice of Parliament. An Act was, therefore, passed, which declared that the judges had done right, and the sentences of death were ratified. The services of the Lord Advocate were specially commended; and it was ordained that, in all time coming, he and his successors ought to proceed against all such persons as the Privy Council wished them to prosecute, even although the trials should take place in absence of the accused.¹

Among the members of the Parliament which passed this Act was George Mackenzie of Rosehaugh, who afterwards succeeded Sir John Nisbet as Lord Advocate. A few years after trial in absence was thus legalised he published his treatise on Criminal Law, and from what he says on the subject we may gather the opinion of competent persons, on the popular side, as Mackenzie then was, as to this increase in the powers of the public prosecutor. Mackenzie is against the Act. He calls it an innovation; he implies that he thinks it dangerous; and maintains that if it had been safe to grant such a privilege to the Crown, it would have been granted formerly. He sums up his argument against the Act with a sneer at the wisdom of the Lord Advocate, and the other authorities. "Yet," he says, "since so judicious a person proposed this overture, and since Council, Session, and Parliament have fortified it by their authority, I submit my judgment to their determination."²

In July 1668, an incident occurred which, according to Wodrow, "gave a loose to the cruelty of the Bishops and the

¹ Hume, *Crim. Com.* i. 537, 538; Mackenzie, *Criminal Law*, i. vi. 23; *Stat.* 1669, cap. 11. The Lord Advocate had suggested the introduction of trials in absence a long time before the Pentland Rising: Sir John Nisbet to Lauderdale, 2d October 1665.—Lauderdale MSS.

² *Criminal Law*, i. vi. 23.

Advocate." This was an attempt on the life of Archbishop Sharp. He was fired at in the streets of Edinburgh. The cry was raised that a man had been killed. "'Tis but a Bishop," some one said, and all pity ceased. Sharp, having narrowly escaped the fate which he deserved, used every means to discover his assailant, who had escaped in the confusion. In his search Sharp was willingly assisted by Nisbet. Their inquiries extended to high and low. A servant-girl, who had quarrelled with her mistress, went to Sharp, and told him that she could betray the haunt of his enemies, and find the man who tried to kill him. Sharp heard what she had to say, gave her money, and, as Kirkton puts it, "greases the Advocate Nisbet well, to make him active in the pursuit." The girl's master, one Gray, was called before the Privy Council. He suspected that something had been found out against him, and, when "strictly interrogate whether ever any Whiggs used his house," named some who had dined with him. He was asked if he knew who had made the attempt on the Archbishop, and answered that he did not know. The Lord Advocate now thought of a trick which a detective of the nineteenth century would hesitate to play. He went close to the witness, and pretended to admire a ring which he wore. Gray allowed him to take it off. The Lord Advocate then privately told a messenger to take the ring to Gray's wife, and say that her husband had told all he knew, and had sent her his ring as a sign that she might do the same. Deceived in this way, she gave the names of several persons, whose houses were frequented by Presbyterians or Whigs. On the information thus obtained, some ladies were arrested. They were examined before the Privy Council, and, but for the remonstrances of Rothes, would actually have been tortured. "Thou rotten old devil," said Primrose to the Lord Advocate, when he heard of his conduct, "what art thou doing? Thou wilt never rest till thou turn the fury

of this people from the Bishops upon thyself, and get thyself stabbed some day.”¹

In 1670 the project of a Union between England and Scotland was renewed, and Nisbet was one of the Scottish Commissioners appointed to go to London and confer with the representatives of England. The matters submitted to the Commissioners were contained in five Articles or questions:—How the laws, civil and ecclesiastical, of the two Kingdoms, were to be preserved entire? How the two Kingdoms were to be united in one Monarchy, “under his Majesty, his heirs, and successors”? How the two Parliaments were to be reduced to one? What rules were to regulate the trade of the United Kingdom? How were the conditions of the Union to be secured?² These Articles were considered by the Scottish Commissioners, who met at Lauderdale’s house in Whitehall. A question was at once raised as to whether there could be a Union on the terms proposed, which involved the abolition of the separate Parliament of Scotland. The Lord Advocate said a Union was impossible on such terms, hinted that those who attempted to alter the constitution of the Scottish Parliament might find themselves arraigned on a charge of treason, and pointed to “the union amongst the republics of Greece, as Sparta, Athens, etc., in which union the sovereignty was reserved to each republic.” Lauderdale answered the Lord Advocate by citing the United Provinces and the cantons of Switzerland, where independent States were united in a common Council. There was much debating, but the Union was not to take place. Neither in Scotland nor in England was the project viewed with favour. Scotsmen wished the whole of their Parliament to be admitted to the Parliament of the United Kingdom: a proposal at which

¹ Wodrow, ii. 117, 118 (ed. 1829) ; Kirkton, 282-284.

² Mackenzie, Hist. 197.

Englishmen merely laughed. The negotiations closed abruptly. In Scotland there was some surprise that Lauderdale had not felt his ground more carefully before entering on such a difficult matter. But the part which the Lord Advocate had taken was approved.¹

In the meantime the Commissioners had been quarrelling among themselves. Lauderdale and Tweeddale were not on speaking terms. The Chancellor had abused Primrose and the Advocate for walking on foot about the streets of London, and called them "damned lawyers." They heard of this, and picked a quarrel with him. He turned on them, and said he would accuse them to the King of trying to frustrate the Union, by creating bad feeling among the Commissioners. "And thus, in place of uniting the nations, those wise Commissioners disunited themselves, and returned to Scotland, as men from a rout."²

While the personages who had been to Court were thus wrangling and squabbling, a storm was brewing in the legal circles of Edinburgh. The state of the Court of Session had gradually become intolerable. The abuses were notorious. Both bar and bench were to blame. The bar resorted to every device for the purpose of protracting law-suits. "It is your gain to make pleas immortal," they had once been told by a great judge. The advocates came to Court or not as they thought fit. The hour of meeting was nine; they sauntered up to the Tolbooth at half-past nine. When pleading, their conduct was disgraceful. Unseemly brawling, uncivil disputes about having the last word, rude interruptions, were matters of every-day occurrence. They exacted exorbitant fees, and made long speeches, for the purpose of obtaining more money by refusing to attend next day without fresh fees. The judges, too, behaved badly. They

¹ Mackenzie, Hist. 199-211; Law's Memorials, 31.

² Mackenzie, Hist. 213.

claimed the right of calling cases when they pleased; and used this privilege for the purpose of surprising clients whom they wished to place at a disadvantage. Some judges took bribes to decide in favour of rich litigants; others were paid to stay away. Sometimes parties were formed on the bench, and a legal point was decided in accordance with the political views of the judges. At other times the lawyers on the bench were in a minority, and the judgment was ruled by the votes of persons who knew little about law. In 1669 a Royal Commission was appointed to inquire into the state of the Court. It held frequent meetings, and presented a report to the King, in March 1670, which suggested that rules should be made as to the fees paid to the bar. The pay of the advocate was to be regulated by the position of his client. For consulting, pleading, and preparing written arguments, a nobleman was to pay not more than eighteen pounds, a knight or baronet fifteen, a gentleman or burgess twelve pounds, "and by all the rest of the people nine pounds." The client was to swear that he had not given, and the advocate that he had not taken, more than the fees allowed by the regulations. The judges called upon the advocates to take this oath, but they declined. The judges still insisted, on which the advocates refused to plead, and withdrew from the Courts for about two months.¹

But the struggle was soon over. It was on the 10th of November 1670 that the advocates refused to plead.² In December, the Lord President, Sir John Gilmour, resigned. The Dean of Faculty, Sir Robert Sinclair, who was in London, knew that the Lord Advocate would receive an

¹ Spotiswoode's Speech to the Advocates; Fountainhall, Hist. Notices, *passim*; Stair, Institutes, iv. ii. 6; Act. Parl. Scot. viii. 85.

² On Tuesday the 8th of November 1670 the Faculty had met to consider the subject of the oath, when all present—except one, a Mr. James Foulis—agreed to refuse, although they were told that the judges desired them to take the oath without delay.—Minutes of the Faculty of Advocates.

offer of the President's chair, and, in hopes of being made Lord Advocate himself, came down to Scotland, where he at once took the oath as to fees. To Lauderdale's surprise Nisbet preferred to remain Lord Advocate, and Sir James Dalrymple, afterwards Viscount Stair, was appointed President. Sinclair was therefore disappointed in his hopes of office; but the bar knew that the Dean had taken the oath, and a meeting was held at which it was decided to follow his example.¹ But the sore was not healed at once. The bench and the bar remained on bad terms for some time, and the Court was a scene of constant wrangling, sometimes between judges and advocates, and sometimes among the judges themselves. It is said that on these occasions the President and the Advocate were conspicuous, "each of them raking, though from hell, all that may anyway conduce to carry the causes which they head,

Flectere si nequeo Superos, Acheronta movebo."²

The report of the Law Courts Commission led to an Act of Parliament which passed in 1672. This Act consisted of a series of regulations for the Court of Session, the Court of Exchequer, and the Justice Court. In the Court of Session useful rules were enacted, by which all suitors were able to know when their cases were to be heard. Cases were to be taken in regular order, with the exception of those to which the Crown was a party. These the Lord Advocate might call when he pleased. In spite of the opposition of the bar, the regulations as to fees were passed. The provisions as to Court of Exchequer were of a purely formal character. It was the administration of the Criminal Law which was chiefly affected by the Act.

Hitherto the criminal judges had been the Justice-

¹ Mackenzie, Hist. 214-216. No minutes of the Faculty of Advocates are now in existence for the period from 8th November 1670 to 6th January 1672.

² Fountainhall, Historical Notices, i. 40.

General, the Justice-Clerk, and the Justice-Deputes, the latter usually young men who had not had much experience, and who were ready to act for a small salary. All this was changed. The office of Justice-Depute was abolished, and the High Court of Justiciary, which is still the supreme Court of criminal jurisdiction in Scotland, was established. The judges were to be five judges of the Court of Session, acting along with the Justice-General and the Justice-Clerk.¹ "For the splendour of the Court," these judges were to sit in red robes faced with white, and the robes of the Justice-General were to be lined with ermine. Circuit Courts were also provided for; but they soon fell into disuse, and no Circuits were held in Scotland from the accession of James until after the Union.

The old Justice Court had never been really independent. Both the Privy Council and the Court of Session had claimed the right of interfering, in diverse ways, with its decisions. But the establishment of the High Court of Justiciary put an end to this; and many abuses, which had arisen from the dependent position of the old Court, gradually passed away. The rules of criminal procedure were, in many ways, changed for the better. One reform, which was introduced in 1672, was of vital importance. Prisoners were now furnished with a list of Crown witnesses and jurymen, and were even allowed to cite witnesses for their defence. Previous to 1661, the only witnesses whom a prisoner could examine were the witnesses for the prosecution, or any persons who might chance to be in the Court-room. No warrants to cite witnesses for the defence were ever granted, although the Lord Advocate could cite his witnesses. But in 1661 the

¹ The Lord Justice-Clerk, originally the Justice's clerk, was not a judge until after the Restoration. Till 1663 he sat as an assessor to the Justice. But on 10th December 1663 the Privy Council passed an Act declaring "That the Lord Justice-Clerk is one of the Judges of the Justice Court."—Hume, Crim. Com. ii. 17.

Justices began to grant "precepts of exculpations," which stated the proposed defence, and gave a warrant to cite witnesses to prove it.¹ These "letters of exculpation," however, might be refused by the Justices. But now, by the Act of 1672, the privilege of citing witnesses for the defence was conferred on all prisoners.²

In 1677 Nisbet was forced to resign. His cousin, Sir Patrick Nisbet of Dean, was accused before the Privy Council of perjury. The Lord Advocate advised him to pay his accuser four thousand merks to settle the case, and have the depositions destroyed. This was promoting collusion, and was a direct violation of the Act of 1587, under which the Lord Advocate became public prosecutor. Charles Maitland of Halton, Lauderdale's brother, whose own hands were not very clean, said he would prevent this, and have the case tried. But the depositions were given to one of the Nisbets, who destroyed them.³ Halton, however, watched his opportunity, and was soon able to bring another charge against the Lord Advocate. He accused him of having given advice and taken fees on both sides in a case relating to the entail of the Leven estates. The judges of the Court of Session were directed to investigate the truth of this serious charge. The appointment of Lord Advocate was offered to Sir George Mackenzie. He declined to take it, advised Nisbet to defend himself, and offered to assist him. "But he," says Mackenzie, "fearing Halton's influence, and finding it impossible to stand in that ticklish employment without the favour of the first ministers, did demit his employment under his own hand."

Nisbet died in April 1687. He is now best known as the author of "Dirleton's Doubts," a work the outside at

¹ Mackenzie, Criminal Law, ii. xxii. 1; Hume, Crim. Com. ii. 398.

² Stat. 1672, cap. 16; Hume, Crim. Com. ii. 398, 399; Mackenzie, Observations, 447.

³ Fountainhall, Historical Notices, i. 139.

least of which is familiar to Scottish lawyers. Mackenzie and Burnet agree in praising his legal acquirements, and the former assigns to him the palm of oratory over Gilmour, the eloquent advocate, who, at the Restoration, became President of the Court of Session. But at a time when bad men were common, he was one of the worst ; and it does not appear that, in the course of his public career, he ever did one deed which lightens the darkness of his servile and mercenary life.

CHAPTER VIII.

SIR GEORGE MACKENZIE.

ON the resignation of Lord Advocate Nisbet, Sir George Mackenzie and Sir George Lockhart were both rivals for his office. They had each a zealous partisan. On the one side the dissolute and haughty Duchess of Lauderdale intrigued to secure the advancement of Lockhart, once a lover, and now a useful friend. On the other side Halton, out of jealousy against Lockhart, did all he could to obtain the appointment for Mackenzie. Halton carried his point, and on the 23d of August 1677 Mackenzie became Lord Advocate.

Mackenzie was the son of Simon Mackenzie, brother to the Earl of Seaforth, and Elizabeth, daughter of Doctor Bruce, Principal of St. Leonard's College at St. Andrews. He was born at Dundee in 1636 ; and it is said that when a boy he was noted for the vivacity of his manners, and for the ease with which he learned his tasks at school. From school he was sent to the Universities of Aberdeen and St. Andrews, and had completed his studies in the classics and in philosophy by the time he was fifteen years old. He then went abroad, and read law for three years at Bourges.¹ Mackenzie was called to the bar of Scotland in 1659, and re-admitted, after the Restoration, on the 5th of January 1661.

He was one of the counsel who defended Argyll at his

¹ Mackenzie's Works, Preface.

trial for high treason in April 1661. The prisoner had desired to have Nisbet as his counsel; but he had refused to plead, and the defence was intrusted to Sinclair, afterwards Dean of Faculty, John Cunninghame, one of the best counsel at the bar, and Mackenzie.

Mackenzie had the most exalted ideas of his calling. "What," he asks in one of his Essays, "can the world bestow above what it allows the advocate, as the reward of his noble pains? What is so desirable as to be a sanctuary to such as are afflicted, to pull the innocent from the claws of his accuser, to gain bread for the hungry, and to bring the guilty to a scaffold?" At Argyll's trial he spoke under the influence of this sentiment. He had, all through life, the courage of his opinions; and his speech, which was delivered just before judgment was given, was so bold as to excite much surprise. "My Lord Chancellor," he began, "I wish it may be the last misfortune of my noble client, that he should be now abandoned to the patronage of so weak a pleader as I am, whose unripeness both in years and experience, may, and will, take from me that confidence, and from your Lordships that respect, which were requisite in an affair of this import." He then went on to argue that every one in Scotland had been guilty of compliance with Cromwell, if Argyll was guilty, and that, in those troubled times, compliance was really necessary. "Without complying at that time," he said, "no man could entertain his dear wife or sweet children; this only kept men from starving; by it only men could preserve their ancient estates, and satisfy their debts, which, in honour and conscience, they were bound to pay; and without it, so eminent a person as the Marquis of Argyll, and so much eyed by these rebels, could not otherwise secure his life against the snares which were daily laid for it." He hinted, or rather said, that their

Lordships themselves were guilty of compliance ; and asked if it were not unjust "that he should suffer for acts of frailty, when the ringleaders and malicious plotters pass unpunished." He made a clever attack on the evidence produced by the Lord Advocate, and said that he must tell their Lordships that the world feared they were about to condemn his client on insufficient evidence. He ended with these words: "My Lords, as law obliges you to absolve this noble person, so your interest should persuade you to it. What is now intended against him may be intended against you ; and your sentence will make that a crime in all compliers, which was before but an error and a frailty. Your Royal Master may, with our Saviour, then say to you, *Thou cruel servant, I will condemn thee out of thy own mouth* ; or, if your Lordships be pardoned, he may say to you, as his master said to the other, *Sure I did pardon thee, why wast thou so cruel to thy fellow-servant* ? But not only may this prove a snare to your Lordships, but to your posterity. Who in this kingdom can sleep securely this night, if this noble person be condemned for a compliance, since the Act of Indemnity is not yet past ? And albeit his Majesty's clemency be unparalleled, yet it is hard to have our lives hung at a 'may-be,' and whilst we have a sentence-condemnator standing against us. Phalaris was burnt in his own bull ; and it is remarkable that he who first brought in the Maiden, did himself suffer by it."¹ The evidence was insufficient ; but the letters which Monck, with rare treachery, had sent down from London, arrived in time to secure a conviction. Mackenzie was taken to task for the bold way in which he had spoken, but he merely laughed, and answered, "It is impossible to speak for a traitor without speaking treason !"

Mackenzie began his literary career by composing a

¹ Works, i. Pleading xv. 80-84.

work of fiction, which he published in 1661, under the title of "Aretina, or The Serious Romance." "Aretina," probably the first novel written in Scotland, is a thick volume containing about four hundred small pages. The scene is laid in Egypt. Aretina, the heroine, is the daughter of Monanthropus, "lately Chancellor of Egypt." She is beloved by two friends, who are rivals for her heart, Philaretus and Megistus. Of Philaretus we are told, "His noble heart, which was formerly Mars his shop, wherein he forged thousands of heroick thoughts, became now an altar whereon he sacrificed daily his dearest faculties to his lovely Aretina." There are adventures of all sorts, men in masks, tilting before kings and queens, with many descriptions of deserts, and woods, and castles. But the plot is without interest, and the conclusion of the story is very tame. The language of the characters is absurdly bombastic. Part of one speech, in which Philaretus, who is the successful suitor, makes love to Aretina, may be quoted as an example of the way in which they address each other. "Divine Aretina, the least sparkle of your acquaintance is able not only to thaw the ice of indifferency, but even to kindle the flames of love in a colder breast than mine. But, madam, the disproportion between your merit and my naughtiness obliges me to smother my affection, and yet, O know, that in smothering it, I shall murder a person who might otherwise live to do you a service. . . . Fair lady, I shall always esteem myself more or less fortunate, according as ye frown or smile upon me, and your thoughts are the only stars whereby my horoscope may be casten."

In 1663 he published "The Religious Stoic; with a Friendly Address to the Fanatics of all Sects and Sorts." This work he calls an attack on "the madcap zealots of this bigot age." It is not a harsh attack. It is curious to read, as the language of the "Bloodthirsty Advocate," these

words: "My heart bleeds when I consider how scaffolds were died with Christian blood, and the fields covered with the carcases of murdered Christians;" or again, "True religion and undefiled is to visit the widow and the fatherless, and the Ditty drawn up against the damned spirits shall be, that when our Saviour's poor ones were hungry, they did not feed them; when they were naked, they did not clothe them, without mentioning anything of their belief in matters of controversy and government;" or again, "Opinion, kept within its own proper bounds, is a pure act of the mind, and so it would appear that to punish the body for that which is a guilt of the soul, is as unjust as to punish one relative for another."

In 1665 he produced an essay on "Solitude preferred to Public Employment." Read in the light of the author's own stormy career, this is an interesting work, for he labours to show that men who take office "differ but by an ace from those who have keepers at Bedlam." The essay on Solitude was answered by Evelyn in a work called "Public Employment and an Active Life, with its Appanages, preferred to Solitude." Evelyn certainly was not serious in his contention.¹ It is probable that Mackenzie had not been very much in earnest in his praises of solitude.

In 1667 appeared "Moral Gallantry," to which he added "A Consolation against Calumnies; showing how to bear them easily and pleasantly." In this work one of his maxims is that "unjust calumnies fall no otherwise upon a wise man than hail upon a strong house, whose fall causeth greater noise than prejudice." Ten years after these words were written he took office, and what he considered unjust calumny was busy with his name throughout the rest of his life.

He was returned to Parliament, as one of the two

¹ Evelyn to Cowley, 12th March 1667.

members for Ross-shire, at the general election of 1669. It was the second Parliament of Charles the Second. The Opposition, headed by the Duke of Hamilton, had much in its favour. Lauderdale had waxed fat, and kicked. He took no pains to conciliate his enemies, and scarcely cared to be courteous to his supporters. He thought his position so secure that he became heedless. In private, his coarse stories and bad language had cost him the confidence of the Presbyterians. In public, his arrogant bearing and violent words had diminished his influence over the Episcopalians. The Opposition was compact and powerful, and Mackenzie was soon to be the boldest of its leaders.

When Parliament met, on the 19th of October 1669, prominence was given in the King's letter to the proposed Union of the Kingdoms. The address in reply to the letter was moved on the 21st of October. It expressed the willingness of Parliament to appoint Commissioners to consider the subject of Union, leaving it to his Majesty to name the Commissioners, and the time and place of their meeting. Mackenzie moved the adjournment of the House till the following day. To this the Government reluctantly agreed. When the debate on the address was resumed on the meeting of the House next day, Mackenzie moved an amendment, to the effect that the House agreed to a Commission on Union, "under such reservations as the Parliament should think necessary." He denied that his object was to defeat the project of a Union. All he objected to was a hasty decision. "What," he said, "is got cheaply is little valued; and in these affairs wherein we can do but once we should deliberate long." His chief objection to the address was that it left to the King the nomination of Commissioners, their number, and their place of meeting. "It is designed," he said, "that this Union should be a national act; and the way to make it so is, that all its

steps should be nationally concluded; and certainly the nomination of Commissioners is the chiefest part of the treaty, seeing much must be referred to their fidelity and conduct."

While Mackenzie was speaking, the Earl of Tweeddale interrupted him, and declared it was intolerable that the House should be compelled to listen to such long harangues, "especially where they intended to persuade the Parliament not to comply with his Majesty's wishes." There was an angry scene. The Opposition shouted "Order!" Tweeddale's conduct was declared to be a breach of privilege; and the Duke of Hamilton moved that he should be sent to the bar of the House. But Mackenzie rose, and said that he had finished his speech; on which the Duke of Hamilton withdrew his motion.¹ The address was agreed to; but, as is well known, the negotiations for Union came to nothing.

Mackenzie's conduct in Opposition exposed him to the enmity of Lauderdale, who, on one occasion, made up his mind to deprive him of his seat in Parliament. The Government carried an Act to impose on merchants an oath that they had paid duty on all goods which they imported. Before it passed it was strenuously opposed. In the debate Lauderdale said that "stealing the King's customs was a crime." To this Mackenzie replied, "If it is a crime, no man can be forced to swear for it; for by no law under heaven was it ever ordained that a man should swear in what was criminal." This sharp answer irritated Lauderdale. The Government carried their point; but Lauderdale, on his way home, after the House rose, swore he would have "that factious young man removed from Parliament." This was no unmeaning threat. A plan was actually arranged for unseating Mackenzie, on the ground that he was not a freeholder, and, therefore, was not qualified to sit in Par-

¹ Mackenzie, History, 155.

liament. There was some ground for this statement. But Sir Archibald Primrose was consulted. That astute politician always favoured the side which was apparently losing, in order that when the tide turned he might receive his reward.¹ True to this principle and to his cautious temperament, he persuaded Lauderdale to take no steps against the member for Ross-shire. Any attempt to unseat him "would," he said, "make the people jealous of some close design to overturn their liberties, which, as they believed, that gentleman defended upon all occasions; and that he would glory in his exclusion, because it would be believed that they could not effectuate their intentions if he were allowed to keep his place in Parliament."²

It was during this session that the conduct of Lord Advocate Nisbet in reference to the Pentland Rising was commended, and the Act passed which authorised trials in absence of the accused.³ Mackenzie led on the popular side. The speech which he made against the Government was an able statement of the unanswerable arguments against what was done; but his concluding words were very grotesque. "God Himself," he exclaimed, "would not condemn Adam, till He heard him; and though He knew the sins of Sodom and Gomorrah, He would not pronounce sentence against them, till He went down and saw their abominations. Let us not, then, make Snares in place of Laws; and whilst we study only to punish such as are traitors, let us not hazard the innocence of such as are loyal subjects."⁴

The third session of the Parliament opened on the 12th of June 1672; and the citizens heard with indignation that the Duchess of Lauderdale and her ladies had been present

¹ Burnet, History of His Own Times, i. 205 (3d ed. 1766).

² Mackenzie, History, 173.

³ Stat. 1669, cap. 11; *supra*, p. 191.

⁴ Works, Pleading xiv.

to hear the Duke's speech. The presence of women in the Parliament House was a novelty. In the taverns of the High Street, among rich and poor, the name of the Duchess passed from tongue to tongue with scornful freedom, and jests were made about the humble origin of Bessie Murray, whose infamous life was suspected, and whose avarice was notorious.¹ She was, moreover, said to have originated a proposal which caused great excitement in the city. In his speech, at the opening of Parliament, the Duke announced that the summer sittings of the Court of Session were to cease. This proposal was vehemently disliked. The tradesmen of Edinburgh were up in arms. To take away the judges, advocates, and law-agents, was to take away their best customers. The Edinburgh season was in June and July, and many an honest penny was turned by the sale of silk, and other summer fabrics, to the daughters of judges and rich members of the bar. It was said that the Duchess had calculated all this, and had raised the question in order that she might be bribed to influence Lauderdale against the proposal. The dispute was soon settled. Those who were for the summer session chose five speakers, those who were against it chose other five, and the question was debated before the Commissioner. Mackenzie was one of the speakers for the abolition of the summer session, owing to which, he pointed out, the pleasant months of June and July were "spent in the most unwholesome and unpleasant town of Scotland." But the arguments in favour of the summer session were weightier than any that could be brought against it. It was impossible to interrupt the sittings of the Law Courts for the whole of the summer; and the Commissioner decided that things should remain as they were.

In August 1674 the Burghs of Scotland met in Con-

¹ Mackenzie, History, 220.

vention, and prepared a letter to the King, in which the recent Statutes were attacked, and his Majesty was requested to call a new Parliament. Lauderdale resented this. The Provosts of Glasgow, Aberdeen, and Jedburgh were put in prison for a time; and afterwards, along with the chief magistrates of all the Burghs which had concurred in the letter to the King, they were called before the Privy Council and examined. The Council ordered them to say who had written the letter. It came out that Mackenzie was the author; and the offending magistrates were fined, and sent home.¹ Lauderdale took no steps against Mackenzie. He had, before this, changed his opinion of the member for Ross-shire. The "factious young man" was a person to be at least respected.² In three years he was Lord Advocate. But before that time came, the bar of Scotland passed through a crisis, which formed the turning-point of Mackenzie's career. It was a dispute, involving an important constitutional question, between the bench and the bar.

The main facts were these:—The Earl of Dunfermline was at law with the Earl of Callendar. In the course of the lawsuit the Court of Session gave judgment, on a point of procedure, against Callendar. He intimated an appeal to the Parliament of Scotland. The judges took this as a contempt of Court, and ordered him to appear before them. He consulted Sir George Lockhart, Sir Robert Sinclair, Sir John Cunninghame, and Mackenzie, who prepared a paper explaining the nature of the proposed appeal. The moment the judges saw this paper, they called the four advocates before them. The advocates appeared, and defended what they had done. On this, the judges, well aware that Charles would prefer that the corrupt tribunal, of which they were members, should be free from appeals, complained to the King. Charles

¹ Law's Memorials, 72, 73.

² Mackenzie, History, 259.

answered by declaring his abhorrence of appeals, and commanding the advocates never to mention them, "either publicly in the exercise of their function, or privately in their ordinary conversation with their clients," under pain of being forbidden to plead. Lockhart and Cunninghame were called before the judges. They declined to submit, and were refused leave to plead. Almost the whole bar then retired from practice, and left Edinburgh, followed by the frowns of the judges and the sneers of the citizens, who prophesied that a few months without fees would soon bring them back. One party, led by Lockhart, went to Haddington; another, under Cunninghame, went to Linlithgow.

An address to the Privy Council, setting forth the grievances of the bar, was prepared by Lockhart. Mackenzie thought it was too "bitter and humorous," but he agreed to sign it. When it was presented, the Council declared it to be seditious, and sent it to the King. Cunninghame was despatched to London to represent the bar. Lockhart and Sinclair soon went after him. According to Mackenzie, they solemnly promised to return at once, if the other advocates, who had signed the address to the Council, were prosecuted. A prosecution was soon instituted, by an indictment at the instance of Lord Advocate Nisbet. Mackenzie prepared defences, and gave them in; but Lockhart, Sinclair, and Cunninghame remained in England. Mackenzie says they were in hiding, that even their wives could not tell where they were, and that he had reason to know they were waiting to see whether he was condemned or acquitted. The end soon came. Mackenzie, convinced that Lockhart was leaving him to bear the storm alone, assembled the advocates, and persuaded them to submit. "And thus that storm spent itself, without prejudice to the authority it had opposed; all rebellions being still found

either to fix, or to destroy, the power against which they are raised.”¹

The struggle, which lasted two years, was the turning-point of Mackenzie's life. He detested Sir George Lockhart. Fifteen years before, he had seen him humbly kneeling to ask pardon for his conduct during the Commonwealth. Perhaps he had even felt pity for the Protector's Advocate, and thought he was a man whose career was at an end. In legal knowledge he was greatly inferior to Lockhart. The great lawyer, as proud as he was learned, treated most of his brethren at the bar with open contempt. With many he declined to argue seriously. Mackenzie resented the arrogant bearing of Lockhart. Lockhart might despise him, but he would yet be a rival to Lockhart. During the secession of the bar his jealousy and hatred became keener. Mackenzie was a man of the highest personal courage. He did not shrink from facing the anger of the judges, which he feared as little as he had feared the swollen face of Lauderdale, purple with rage, in the Parliament House. His devotion to the bar had led him to join a movement the wisdom of which he doubted from the first. But after two years he found himself in this position. He was the foremost advocate left in Edinburgh. Lockhart, the object of his mingled hate, jealousy, and contempt, was absent, waiting, as he thought, to see him sacrificed. His influence with the bar was great. He was alone at his post. He had stood out long enough to save his self-respect and his reputation among his brethren. He could now reconcile the bench and the bar. He was ambitious, and had already declined the office of Lord Justice-Clerk. It was in his power to secure the favour of Government, and make the attainment of high office a mere

¹ Mackenzie, *History*, 267-310; Mackay, *Memoir of Stair*, 113-120; Brunton and Haig, 421-424. The account given by Mackenzie of this episode is the best we have; but (it is hardly necessary to mention) all he says about Sir George Lockhart must be received with caution.

question of time. These motives might not, in themselves, have been enough. But another feeling influenced him. He had been a popular leader; but deep in Mackenzie's heart there was a profound respect for royalty and the prerogative. He, perhaps, was unconscious of it, and thought himself a man of the people. But, in truth, his sympathies were with the Crown, and he was prone to suspect the motives of any popular movement. He began to regard the contest between the bar and the Crown with disfavour and suspicion. He himself says that Lockhart's conduct in leaving him to his fate "did so confirm his former aversion to these principles, which he daily discovered to have inflamed the ignorant people beyond his first inclinations, that he resolved to submit to his Prince." The speech which he made to the bar was shrewd and plausible. He spoke of Lockhart and his friends as "cowardly rogues" who had betrayed their brethren. He told his hearers they were martyrs by mistake; and ended by saying "it was no dishonour to submit to their Prince; ceding being only dishonourable amongst equals, and never being so when the contest was raised by such as designed to make them knaves and fools; all such tumults tended to sedition, and sedition to war; in which advocates not only became losers, but insignificant."¹ He spoke to willing ears, and his advice was taken.

Thus it was that Sir George Mackenzie, who began life as the defender of popular rights, ended his days as the champion of arbitrary power. Henceforth he was on the King's side. He received his reward. The honour of knighthood was conferred upon him, along with the rank of a Privy Councillor; and when Nisbet was driven from office he was preferred to Lockhart, and became Lord Advocate.

¹ Mackenzie, *History*, 309.

On taking office Mackenzie found the jails full of wretches whom Nisbet had left in chains, because he had neither been bribed to prosecute them nor bribed to release them. The new Lord Advocate made up his mind to empty the prisons, and did so without a thought of the hardships he inflicted. In one case, two men had been confined for six years without trial. In a civil action, the Court of Session, by a majority of one, had declared that a certain writ was forged. These two men were the persons who would have benefited by the crime, and they had been arrested on a charge of forgery. Mackenzie now hurried them before the Court of Justiciary. The only evidence which he produced was the judgment of the Court of Session; but the jury convicted them, and they were hanged.¹

Prosecutions for nonconformity were numerous; and Mackenzie claims to have commenced his term of office by persuading the Privy Council to sanction certain rules, which he had framed, to prevent "all the fanatics' just exceptions against the forms formerly used against them." By these rules the Lord Advocate would, in future, be tied to greater precision as to time and place in drawing indictments. As regarded time, he might state a period of only four weeks; and as regarded place, he must name a spot within a certain parish, "or near to the said parish, for else conventicles may be kept upon confines of parishes, merely to disappoint his way of libelling."² This reform was probably brought about by Mackenzie; but the fact that, in his "Vindication of the Reign of Charles the Second," he takes credit for at least one important reform which he never introduced, renders it necessary to receive with caution all he says on the subject of law reform.

Soon after he became Lord Advocate, Mackenzie conducted one of the most infamous prosecutions which ever

¹ Fountainhall, *Historical Notices*, i. 180.

² *History*, 322, 323.

took place in Scotland. Mitchell, who tried to shoot Archbishop Sharp in 1668, had escaped to Holland.¹ In 1674 he returned, was arrested, examined before the Privy Council, and confessed his guilt on a promise of life. Sir John Nisbet, then Lord Advocate, proposed that he should sign his confession. This he did in presence of the Council; after which he was sent to jail and confined for two years. He was then brought once more before the Privy Council, and called upon to admit his signature to the confession. He refused; and the torture was ordered. The executioner put one of his legs in the boot, and drove in the wedges, while the Privy Councillors watched their victim. At the ninth stroke he fainted, and was carried back to his cell. On the 7th of January 1678 he was tried before Sir Archibald Primrose, who, much against his will, had been deprived, to please the Duchess of Lauderdale, of the rich post of Lord Clerk Register, and had been made Lord Justice-General. Sir George Mackenzie prosecuted. Lockhart was for the defence. The evidence against the prisoner was his own confession. His defence was that he had made it under a promise that his life would be spared. The Lord Advocate argued that such a defence was incompetent; but Primrose held that if the accused could prove it, he was entitled to do so. Four courtly perjurers then went into the witness-box: John, Earl of Rothes, Lord Chancellor of Scotland; Charles Maitland of Halton, Lord Treasurer-Depute; John, Duke of Lauderdale; and James Sharp, Archbishop of St. Andrews. They all swore that no promise of life had been given to Mitchell. Lockhart, in cross-examination, asked the Lord Chancellor if he had not taken Mitchell by the hand, and said, "James, man, confess, and, as I am Chancellor of Scotland, you shall be safe in life and limb." His Lordship only replied that he hoped he would be trusted

¹ *Supra*, pp. 191, 192.

rather than the accused. The Archbishop lost his temper, and refused to answer any questions. When Lockhart produced a copy of the Act of Council recalling the promise of life, which must, therefore, have been given, Lauderdale flew into a rage, and said he had come to give evidence, and not to be accused of perjury. Lockhart defended the prisoner with great skill and ability.¹ But the jury, composed of persons in the pay of Government, returned a verdict of guilty, and sentence of death was at once pronounced. Primrose, as he left the Court-room, said that if Lady Lauderdale had lost him the place of Lord Clerk Register, it was some consolation to think that her husband had lost his soul by perjury.²

It was now that Sir George earned the name of "The Bloody Mackenzie." The murder of Sharp, and the fights at Drumclog and Bothwell Bridge, put an end to all hopes of reconciliation; and as the Lord Advocate was the mouth-piece of the Government in the Criminal Courts, he was soon a marked man. One Sunday in September 1680, the non-conformist Cargill preached to a conventicle at Torwood in Stirlingshire. At the end of his sermon he pronounced sentence of excommunication against the King, York, Monmouth, Lauderdale, Rothes, Dalziel, Lord Ross, and the Lord Advocate. Copies of this sentence were posted up, by unknown hands, on the doors of the Parliament House; and, after this, the victims of the Government frequently alluded to it in their "testimonies" and "dying speeches." "I leave my blood," said one of them, "on the bloody crew who call themselves rulers. . . . I leave my blood on those Criminal Lords, as they call themselves, and especially that excommunicate tyrant, George Mackenzie, the

¹ Fountainhall. Mackenzie says, "Sir George Lockhart refused to speak for Mitchell, being afraid to offend Lauderdale."—History, 329.

² State Trials, vi. 1207-1262; Mackenzie, History, 326-329; Kirkton, 333, 384; Hill Burton, Hist. Scot. vii. 482-490.

Advocate.”¹ Cargill soon paid for his rashness. He was taken prisoner, prosecuted by the Lord Advocate, and condemned to death.

Parliament met on the 28th of July 1681, the day after the execution of Cargill. The Duke of York was Commissioner. The spectacle presented by the Court at Holyrood was a painful contrast to the condition of the nation. While hundreds of the King’s subjects were being daily goaded to madness by the terrors of the law, and while the policy of the Government was spreading despair and misery over wide districts of the country, Holyrood was the scene of brilliant festivities. The Duchess of York, Mary D’Este, daughter of the Duke of Modena, was a very different person from the woman who, as Duchess of Lauderdale, had lately ruled the world of fashion in Edinburgh. With her was the “Lady Anne,” afterwards Queen Anne of England. They were surrounded by a gay retinue of lords-in-waiting and maids of honour. It was the policy of the Duke to conciliate the upper classes, and he kept open house in the old Palace. “Tea,” it is said, “for the first time heard of in Scotland, was given as a treat by the Princesses to the Scottish ladies who visited at the Abbey.” Politicians hurried from the blood-stained floor of the Council Chamber to the polished boards of the Palace, to join in the balls and masquerades which the Commissioner provided for their entertainment. In these brilliant revels, far surpassing anything Scotland had ever seen before, Mackenzie was a leading spirit, conspicuous for his jokes, his epigrams, and his irony.²

In the Parliament House, Lord Advocate Mackenzie

¹ Marion Harvey’s Testimony; “From the Tolbooth of Edinburgh, the women-house on the east side of the prison, Jan. 11th, 1681;” *Cloud of Witnesses*.

² *Archæologia Scotica*, i. 499-504; Burnet, *History of His Own Times*. The reader will recollect *Wandering Willie’s Tale in Redgauntlet*: “There was the Bluidy Advocate Mackenyie, who, for his worldly wit and wisdom had been to the rest as a God.”

was a different man from the member who had won his spurs as Knight of the Shire of Ross. His language was now changed from that of the fearless opponent of Lauderdale, or the able debater who had supported the rights of the Burgh constituencies. When accused of insulting the Estates by saying, "I see factious Bothwell Bridge faces sitting as members of Parliament," he defended himself by explaining that what he had said was, that if the Burghs were allowed to choose their own members as they pleased, factious and disloyal persons might be elected.¹

The Test Act was now passed.² All the members of the Privy Council took it, except Lord President Dalrymple, Lord Clerk Register Murray, and the Earl of Argyll. Dalrymple went to London, and begged an interview with the King. His request was refused, and he left the country. Argyll had been dismissed from his place as an Extraordinary Lord of Session, but was still a Commissioner of the Treasury. He was called on to take the Test. Part of the oath made the person taking it swear that he would never attempt any alteration of the Government, either in Church or State. Argyll was ready to take the oath, but with an explanation. He consulted Sir George Lockhart, Sir John Dalrymple, son of the banished President, and six other counsel, all of whom said he was entitled to make an explanation. He then took the oath imposed by the Test Act, with this explanation, "That he conceived this Test did not hinder nor bind him up from endeavouring any alterations to the better, either in Church or State." Nothing was said at the time; but on the following day Argyll was called before the Council, and requested to take the Test without any explanation, which he refused to do. The Council consulted the Lord Advocate, who declared that Argyll was guilty of leasing-making under that series of

¹ Fountainhall, Decisions, i. 150, 151.

² Stat. 1681, cap. 6.

iniquitous Statutes the first of which had been passed in the reign of James the First. He was ordered to the Castle to await his trial. The question at issue was one of pure law. The fact that Argyll had made an explanation in taking the Test was undeniable; and the point to be decided was whether that explanation brought him under the Acts against leasing-making. Lockhart was the best lawyer at the bar, and Argyll wished to retain him. "If," said the Duke of York, "Sir George Lockhart pleads for Argyll, he shall never plead for my brother or me." Ultimately both Lockhart and Sir John Dalrymple were induced to undertake the defence; but after a debate on the law, which lasted for two days, a majority of the bench gave judgment against the accused. All that remained for the jury, who were not allowed to be judges of the law as well as of the fact, was to return a verdict of guilty. Argyll was sentenced to death, but escaped to the Continent. His advocates were called before the Privy Council, and narrowly escaped expulsion from the bar for having signed an opinion that the explanation was not treasonable.¹

The Lord Advocate had strained the law in order to convict the son of his old client. A few years later the open rebellion of Argyll brought him within the grasp of the criminal law. He could then have been justly executed; for he was legally guilty of treason. But Mackenzie insisted that the unjust sentence of 1681 should be enforced, and that his open rebellion should not be directly punished. The secret reason of this was that he wished to do a favour to the house of Argyll. He knew that the old sentence might be reversed; whereas a legal forfeiture following on undoubted treason was not likely to be challenged.²

¹ State Trials, viii. 843-990; Fountainhall, Decisions, i. 160, 166; Hallam, Constitutional History, chap. xvii.

² Hailes' Catalogue, Note 77. "Of the truth of this anecdote," says Lord Hailes, "the publisher has been assured by the relations of the noble family of Argyle."

Sir George Mackenzie once boasted of his services to the Crown. "No King's Advocate," he exclaimed, "has ever screwed the prerogative higher than I have. I deserve to have my statue placed riding behind Charles the Second in the Parliament Close." He has left a nobler monument than that. About the year 1680 he suggested to the Faculty of Advocates that they should found a Library. There were heavy arrears of entry-money due by advocates. These arrears Mackenzie proposed to recover, and devised a plan by which the money was to be spent in buying works on Law. This scheme was opposed by the Town Council of Edinburgh, and little was done till January 1682, when Mackenzie was chosen Dean of the Faculty of Advocates. He had now gained the blue ribbon of the bar of Scotland, the highest honour within reach of an advocate; and he was, henceforth, the life and soul of the Library movement. A house was taken on a lease for nineteen years, at a rent of twenty pounds. The judges passed an Act of Sederunt, under which any advocate failing to pay arrears of entry-money might be expelled from the profession. The Treasurer of the Faculty was directed to buy "all the Scottish Practicks, as also the Scottish Historians." The Advocates' Library was thus founded. Mackenzie was specially thanked for his exertions; and we shall see how one of the last acts of his public life was to deliver an inaugural address when the Library was formally opened.

Meanwhile nonconformity was being more rigorously punished than ever; and the power of Government was concentrated in the hands of a few men. Seven great Ministers were appointed to form a Cabinet for the Management of Scottish Affairs. "They are," says Fountainhall, "as the Articles to the Parliament, to be a preparatory Committee to the Privy Council, to mould, form, and prepare matters, so that the rest of the Councillors will

have little more to do, save to ratify their conclusions." Of this Cabinet the Lord Advocate was a member. It was noticed that Justice-Clerk Maitland was left out. Perth, the Justice-General, who was not an Officer of State, took his place; and the gossip of the day was that the Duchess of Portsmouth had intrigued to bring this about.¹

Towards the close of the year 1684 some of the more desperate Presbyterians, men who had followed Cargill, and who now followed Renwick, drew up the Apologetic Declaration. In this document they declared their adherence, not only to the Covenants, but to all the violent steps which the rashest of the Covenanters had taken. Copies of this treasonable manifesto were nailed on the church doors. The Privy Councillors were not long in answering it; and their answer was the Bloody Act, under which any one who owned the Apologetic Declaration, or who refused to disown it, might be put to death upon the spot before two witnesses.² Severity now followed on severity. The troops killed in the open fields all who even refused to answer the questions put to them. Heavy fines were exacted, and the spoil was shared among the members of the Council. Thanks were voted to Jeffreys for an offer which the notorious Chief-Justice had made "to arrest such rebels, disorderly and disaffected persons, as will flee for eschewing of punishment from this kingdom to the confines of England;" and the Lord Advocate was requested to convey them to him.³

Much of the public prosecutor's work was now done by Claverhouse and his dragoons. Yet, in many cases, Claverhouse would have been powerless without Mackenzie. Claverhouse caught Presbyterians in the field; Mackenzie convicted them in the Court. Endless stories are told of the Lord Advocate's conduct before the Privy Council and

¹ Fountainhall, Decisions, i. 250, 13th Dec. 1683.

² Regist. Secreti Concilii, 22d Nov. 1684.

³ *Ibid.* 3d Dec. 1684.

the High Court of Justiciary. Torture was a customary and effectual mode of examination. Men were carried screaming and struggling into the Council Chamber, to be questioned by the author of "The Religious Stoic." When Gordon of Earlston was brought in, the hangman and his brawny assistants were almost afraid to touch him. The sight of the instruments of torture, and the merciless faces of his judges, destroyed his reason; and he went mad with fear. Once a poor artisan only escaped the torture of the boots because the surgeon, whom it was found necessary to have present on these occasions, told the Lord Advocate that his legs were so weak that they would be broken at the first blow of the hammer. On another occasion the Lord Advocate told a witness, who had declined to answer questions, that, if he did not speak, he would himself pull his tongue out with a pair of pincers.

The trial for treason of Sir Hugh Campbell of Cesnock was the longest of the State trials which took place between the Restoration and the Revolution. It began, before the High Court of Justiciary, on the 24th of March 1684. The Lord Advocate appeared for the Crown; and, in order to prejudice the accused, the Privy Council ordered Sir George Lockhart to assist him in the prosecution. For the defence there were nine counsel, among whom were Sir Patrick Hume and Sir John Lauder of Fountainhall. There was a long debate on the relevancy of the indictment, to which the defence raised several objections. The principal objection was, that Cesnock was only accused of speaking treasonable words, an offence which, it was maintained, did not amount to treason. But the judges had searched the decisions of the English Courts for precedents in favour of constructive treason; and this objection was repelled. After much argument on both sides, the Lord Advocate withdrew part of his indictment, and the case was narrowed to one charge. The accused, it was

said, had met certain persons, and had asked them whence they were coming; "and being answered, 'From the west-land army,' desired them to return, for they would not want assistance, adding, he did not like runaways." On this vague charge the case was sent to trial. The jurors were chosen by the judges, and the Lord Advocate prepared to prove his case. He relied on the evidence of two witnesses named Ingram and Crawford. At eleven o'clock at night, when the Court-room was crowded with spectators, Ingram was put in the witness-box. When he held up his hand to take the oath, the prisoner exclaimed, "Take heed now what you are about to do, and damn not your own soul; for, as I shall answer to God, I never saw you nor spoke to you before." Ingram was sworn; but, to the surprise of every one, he declared he could not recollect hearing Cesnock say the words charged against him. The Justice-General pressed him. "My Lord," he said, "I am upon my great oath, and I declare I do not remember." At these words, the spectators shouted and clapped their hands. The Lord Advocate flew into a rage. "Cesnock," he shouted, "has hired his friends to make this acclamation, in order to confound the King's evidence. I never heard such a Protestant roar, except at the trial of Shaftesbury." As soon as order was restored, the Justice-General pressed Ingram again and again. One of the jury remonstrated. "Sir," said the Justice, "you are not judges in this case." "Yes, my Lord," cried another juror, "we are the only competent judges of the evidence, though not of its relevancy." All the jury-men rose, and said they agreed with those who had spoken. "I never saw such an uproar in this Court," exclaimed the Justice, "nor, I believe, any of my predecessors; and it is not us you condemn, but his Majesty's authority." Ingram was told to stand down; and the other witness, Crawford, was brought in. He also said he knew nothing. There

was another scene. But the prosecution was baffled, and the jury returned a verdict of not guilty.

At a meeting of the Scottish Council, held in London before the prosecution was resolved on, the Lord Advocate had told the King and the Duchess of Portsmouth that there was sufficient evidence to convict Cesnock of treason; and, on the strength of this assurance, the gift of the prisoner's forfeited estate had been promised to one of the King's illegitimate sons. The result of the trial was, therefore, a disappointment to Charles; and, in the hope that some fresh charge might be found against Cesnock, the Lord Advocate sent Cesnock back to prison, where he was confined, along with his son, for nearly two years.¹

The trial of Cesnock took place in March 1684. In July the Earl of Perth became Lord Chancellor, and was succeeded as Justice-General by the Earl of Linlithgow. "The King, every two years," said Sir George Mackenzie, "gives me the trouble of a new Justice-General to breed in the Criminal Court."

The hands of the new judge were full. The next great trial was the well-known prosecution of Baillie of Jerviswoode, who was accused, among other offences, of complicity in the Rye-House Plot. In conducting this case, the Lord Advocate had the assistance of both Sir George Lockhart and Sir John Lauder. Sir Patrick Hume and four juniors appeared for the defence. Jerviswoode, who was in feeble health, was carried into Court in his night-dress, more dead than alive. He was unable to stand; and his sister had to remain beside him, with a bottle of some cordial to revive him. He had not long to live, but the Government determined that he should die upon the scaffold. The evidence for the Crown was weak; but the Lord Advocate made a strong speech to the jury, and pressed them to convict the

¹ State Trials, x. 919-988; Fountainhall, Decisions, i. 286-290, 292.

dying man. When Mackenzie sat down, Jerviswoode solemnly declared that he had always been a supporter of monarchical government, and indignantly denied that he had ever engaged in any plot against the King. "My Lord," he said, turning to the Advocate, "I think it very strange that you bring such charges against me. You may remember that you came to me in prison, and told me what was said, but that you did not believe it. How then, my Lord, is it that you lay such a stain upon me, with such violence? Are you now convinced in your conscience that I am more guilty than before? You may remember what passed between us in prison." Every eye was turned upon the Lord Advocate: "Jerviswoode," he replied, "I own what you say. My thoughts then were as a private man; but what I say here is by special direction of the Privy Council." He paused, and then quickly added, pointing to the Clerk of Court, "He knows my orders." "Well," answered Baillie, "if your Lordship has one conscience for yourself, and another for the Council, I pray God forgive you. I do." The jurymen were enclosed till the following morning, when they returned a verdict of guilty. Baillie was sentenced to be hanged the same day, his head to be cut off, and fixed above one of the city gates, and his body quartered. "My Lords," he said, on hearing the sentence, "the time is short, the sentence is sharp; but I thank my God, who hath made me as fit to die as ye are to live." He was executed on Christmas Eve 1684.¹

Six weeks after the execution of Jerviswoode Charles the Second died.² The trials of Cesnock and Jerviswoode sufficiently prove that Mackenzie had been only too ready to carry out the wishes of his colleagues in the Ministry. But with the new reign came new questions; and when James

¹ State Trials, x. 647-724; Fountainhall, Decisions, i. 324-327; Wodrow, iv. 104-110; Crookshank, ii. 331, 334.

² 6th February 1685.

determined to relax the penal laws against nonconformity, Mackenzie was no longer compliant. On this point he was in opposition to the wishes of the King. He was not alone. There were two parties in the Scottish Ministry. The Duke of Queensberry, who held the office of Lord Treasurer, headed one party; the Earl of Perth, who was Lord Chancellor, headed another. James intimated his wish that the laws against nonconformity should be relaxed in favour of Papists, but enforced against Protestants. The Privy Council did not at once obey; and the King sent for Sir George Lockhart, General Drummond, the Chancellor's cousin, and the Duke of Hamilton. The result of their visit to London was that James still insisted on a relaxation of the Test Act in favour of the Papists. But neither the Parliament of Scotland nor the Privy Council would do his bidding, and the King dismissed six of his ministers. Among them was Sir George Mackenzie. No one was surprised at this. Ever since the question of relaxing the penal laws had been raised, the Lord Chancellor and the Lord Advocate had been on bad terms; and the fall of Mackenzie had been predicted for some time.¹

It was on the 17th of May 1686 that Mackenzie was dismissed. On the 28th, Sir George Lockhart, now President of the Court of Session, received a letter from the King, directing him to act as Lord Advocate, "that the royal prerogative suffer no diminution."² But this was only a temporary arrangement. The President could not permanently act as Lord Advocate; and on the 21st of January 1687 Sir John Dalrymple was appointed to the vacant office.³

It was a strange turn of fortune which made Dalrymple Lord Advocate. Ever since his father, the Lord President,

¹ Fountainhall, Diary, 2d Feb. 1686.

² Fountainhall, Decisions, i. 416.

³ Regist. Magni Sigilli, xii. folio 57 (Paper Register).

had left Scotland on account of the Test Act, Sir John had been under suspicion. In 1683 he was fined five hundred pounds for interfering with the exactions of Claverhouse. Next year he was arrested; at the death of Charles the Second he was a State prisoner; and it was not till January 1686 that he regained his liberty. He now returned to Scotland, bringing with him a royal gift of twelve hundred pounds, a free pardon for his father, and his own appointment as Lord Advocate.

Mackenzie, in the meantime, had gone to London, and sought an interview with the King, who refused to see him. He then returned to Edinburgh, and put on the gown of an ordinary advocate. It was now his task to defend the Presbyterians. This he did with the same zeal which he had formerly displayed in prosecuting them. In the summer of 1687 twenty persons were prosecuted on a charge of either being at Bothwell Bridge, or assembling at that time without lawful authority. Mackenzie defended them, and they were acquitted.

The dispensing power was used for the purpose of relaxing, as far as possible, the laws against Popery. In February 1687 a proclamation was issued in which the Papists were spoken of as "good Christians," and "dutiful subjects." All laws against them were suspended, on condition that they would worship in houses or chapels, and avoid meeting in the open fields. At the same time, "moderate Presbyterians" were permitted to meet in their own houses, and hear ministers who had taken the Indulgence. But they were not "to presume to build meeting-houses, or to use out-houses or barns, but only to exercise in their private houses." Field conventicles were to be rigorously suppressed. "Moderate Quakers" were allowed "to meet and exercise in their form in any place appointed for their worship."¹ In

¹ Pamphlets, Advocates' Library, vol. 15, No. 124.

June another proclamation was issued, which suspended "all penal and sanguinary laws made against any for non-conformity to the religion established by law." But all meetings in the open fields were forbidden.¹

These acts of toleration, though brought about by straining the prerogative, were approved by Dalrymple. Mackenzie, the defender of the arbitrary government of Charles the Second, had lost office because he would not support them. But Dalrymple was Lord Advocate for only one year. His sympathies were with the Presbyterians, and not with either the Episcopalians or the Papists. During his term of office only one non-conformist was sentenced to death. That was James Renwick, the last of those who perished on the scaffold during these troubled times. His offence was grave; for he had been the ringleader of that company of rash men who had openly renounced their allegiance to the King, and had promulgated the Sanquhar Declaration. Yet he was treated, from the time of his arrest until the moment when he mounted the scaffold, with fairness and even personal kindness. In this, perhaps, may be seen the effect of Dalrymple's presence in the Council Chamber. But it was only to the Popish non-conformists that the Court intended to be lenient or tolerant. Dalrymple's views were not those of James, and he was forced to resign. The execution of Renwick took place on the 17th of February 1688. On that day Sir George Mackenzie again appeared as Lord Advocate, and Dalrymple was "degraded to be Justice-Clerk."²

¹ Pamphlets, Advocates' Library, vol. 15, No. 126.

² Impartial Narrative. He was at the same time made a Lord of Session; and the judges declared that the Justice-Clerk had no precedence in the Court of Session, and was only junior judge.—Fountainhall, Diary, 23d February 1688. It appears from some MSS. in the Public Record Office that in 1766 a question was raised as to the precedence of the Lord Justice-Clerk immediately after the Lord President. It was referred to the Secretary of State. In 1808 the Court of Session was divided into two Chambers, over one of which the Lord Justice-Clerk presides, and ever since then he has ranked second in the order of precedence. Sir George Mackenzie's commission, reappointing him Lord Advocate, is dated 31st January 1688.—Regist. Magni Sigilli, xii. folio 86 (Paper Register).

After his return to office Mackenzie prosecuted with less virulence than formerly. But the eyes of all in Scotland were now turned from the Court of Justiciary to the great drama which was proceeding on the wide stage of English politics. The Revolution was at hand; and, on the 5th of November 1688 the Prince of Orange landed at Torbay. The landing of William and the flight of James could not long be concealed from the people of Scotland, although the Privy Council issued proclamations forbidding any one to spread the news.¹ As soon as it was known that the Prince was at St. James's, the leading Scottish statesmen went to London. Among the first to leave Edinburgh were Sir George Mackenzie and his namesake Lord Tarbet.² The roads to London were crowded. Presbyterians from Scotland were joined by Presbyterians from Holland. They formed a strong party; and their favourite place of meeting was at the Ship Tavern in St. James's Street. The conclave which assembled there proposed that five persons, who had held office in Scotland since the Restoration, should be declared for ever incapable of public employment. These were Queensberry, Tarbet, Dundee, Balcarres, and Sir George Mackenzie. But the Prince of Orange would not listen to this proposal.³

In London Mackenzie joined the royalist coteries which were anxiously discussing the state of affairs. Some members of the Tory party were in favour of inviting James to return upon conditions. But Mackenzie was too clear-

¹ Scottish MSS. in the Public Record Office, London. These documents, which I shall refer to as "Scot. MSS. Record Office," are State papers, public and private letters, and memoranda of every description relating to the affairs of Scotland.

² Sir George Mackenzie of Tarbet, who became first Earl of Cromarty in 1703. Perhaps some of the sins of Mackenzie of Tarbet have been visited upon Lord Advocate Mackenzie. In some respects he as much deserves the name of the "Bloody Mackenzie," for he suggested many of the most arbitrary laws which were framed during the reigns of Charles the Second and James the Second.

³ Balcarres Memoirs, 19.

headed to imagine that this was possible; and a fortnight before the Commons voted that the throne was vacant, he admitted that the dynasty of the Stuarts had fallen. The best he hoped for was that William might be induced to establish Episcopacy in Scotland. One day he dined with the Archbishop of Canterbury. Clarendon was there, and a number of English prelates. Mackenzie discoursed on the affairs of Scotland. The Bishops, he said, had done much harm in that country; but they had now come to their senses. He implored the Archbishop to influence William in favour of Episcopacy.¹ Nor did he confine his efforts to after-dinner negotiations. He and Tarbet laid their heads together, and wrote an address to the Prince on the Established Church of Scotland. They explained the recent troubles by saying that, whereas in England the Reformation had been brought about by the royal authority, in Scotland the Reformation had been the result of popular violence. They maintained that Presbytery was inconsistent with monarchy. The Prince, therefore, was bound to support Episcopacy. "You being come to support the laws, you are bound in honour to support Episcopacy, which is confirmed by twenty-seven Parliaments."² But William's policy was to leave the question of the Established Church of Scotland to be settled by the people of Scotland; and the Estates were summoned to meet in Edinburgh on the 14th of March.

Mackenzie returned to Scotland. In the midst of these exciting events, and, as it soon appeared, in danger of his life, he opened the Library of the Faculty of Advocates. This event, interesting to Scottish lawyers, took place on the 1st of March 1689. Mackenzie delivered a Latin speech, in which he described the arrangements for classifying the books,

¹ Evelyn's Diary, 15th January 1689.

² A Memorial for his Highness the Prince of Orange; By Two Persons of Quality. London, 1689.

flattered the judges for the encouragement they had given to the infant Library, and gave the bar some high-sounding advice.¹ This was his last public act as Dean of Faculty. He was still nominally Lord Advocate ; but the Government was really in the hands of the Prince of Orange, who had not yet appointed any Officers of State. The Castle of Edinburgh was occupied by the royalist Duke of Gordon ; but the town was teeming with bands of armed Whigs, who scowled on Mackenzie as he passed, and muttered vows of vengeance on him and all who had helped him in his persecutions.

On Thursday the 14th of March the Estates met. On Saturday, the 16th, it was rumoured that a plot had been concocted to assassinate Sir George Mackenzie and the Viscount Dundee. Dundee, it was asserted, had been informed that the very house in which the conspirators met was known, and that two men had been heard to say in the streets, "We'll use these dogs as we have been used by them." It was moved, in the Convention, that means should be taken to protect the members of the House ; but the Estates refused to do anything.²

At this crisis Mackenzie and Dundee played different parts. The perfidy of Dundee is well known. He declared to James, on the eve of the King's departure from London, that he would make no terms with the Prince of Orange. He paid court to the Prince of Orange the moment he set foot in St. James's. He accepted from James a commission to command his troops in Scotland. He accepted from William

¹ *Oratio Inauguralis in aperienda Jurisconsultorum Bibliotheca* : Mackenzie's Works, vol. i. There is no account of the opening ceremony in the records of the Faculty, as no minutes of its proceedings appear to have been kept from the 16th of February to the 26th of November 1689. We have no means of knowing the number of books in the Library at that time. The first Catalogue was published in 1692, when the number of volumes was 3140.—*Catalogus Librorum Bibliothecæ . . . a Facultate Advocatorum*. Edinburgh : Mosman, 1692. The number of printed volumes at present (1883) is about 280,000.

² Act. Parl. Scot. Supplement, 48 ; Balcanres Memoirs, 29.

the protection of a band of soldiers to guard him on his journey home. He solemnly pledged himself to remain in the Convention till the affairs of Scotland were peacefully settled. He broke his word, left the Convention, and plunged Scotland into civil war. The conduct of Mackenzie was different. When the Estates met on Monday the 18th he was in his place. The Convention was proceeding to the orders of the day, when Mackenzie rose, and moved that the House should adjourn to some other place, where the Estates would be free from those impressions of fear which might be caused by the Castle, and the armed men who crowded the streets.¹ As he was speaking, some of the guards who had been posted to watch the Castle knocked at the door of the Parliament House. They brought news that a troop of Dundee's horse was drawn up on the north side of the town, and that the Duke of Gordon was speaking to Dundee from the Castle walls. The doors were locked; Mackenzie and the royalists who had remained at their posts were detained until it was found that Dundee had marched to the north; and the Whigs were supreme in the Convention. Warrants were issued to arrest all who had been in office under James. These warrants were not enforced; but the Jacobites were thoroughly cowed, and desertions from the King's side were numerous. Mackenzie stood firm. But he hardly dared to show himself in the streets; and, on the 22d of March, a letter from him was read to the Estates, explaining that he was unable to attend the House without danger to his life.²

While political foes were threatening the life of Mackenzie, his old rival, Sir George Lockhart, fell a victim to private revenge. On the morning of Sunday, the 31st of

¹ MSS. Advocates' Library, 31. 3. 9. This is probably the manuscript of which Lord Macaulay says, "The fullest account of these proceedings is furnished by some manuscript notes which are in the Library of the Faculty of Advocates." Hist. Eng. iii. 278. It is anonymous, but is in the handwriting of the time, and appears to have been written from day to day.

² Act. Parl. Scot. Supplement, 48, 55.

March, as the Lord President was on his way home from church, a shot was suddenly fired close behind him. He fell, and was found to be mortally wounded. The murderer was Sir John Chiesly of Dalry, a man notorious, even in these days, for the ferocity of his manners, against whom Lockhart had decided in an arbitration. Chiesly was arrested on the spot, and did not attempt to defend himself. The murder had been deliberately planned. Some time before, when Lockhart was in London, Chiesly had walked up and down Pall Mall, with a pistol concealed under his coat, watching for a chance of attacking him. Lockhart had been warned, but had laughed at the idea of danger. He had now fallen a victim to his cowardly enemy. When the Estates met on the morning after the murder, a petition was presented by the relatives of the Lord President, requesting that Chiesly might be tortured. The House granted this request; and under the torture Chiesly made a full confession. He was indicted at the instance of the Procurator-Fiscal for the city of Edinburgh, tried before the Lord Provost and a jury, and convicted. After two days his right hand was cut off, and he was hanged.¹

But the murder of the Lord President was hardly a nine days' wonder at that period of excitement. It was on the 4th of April that Sir John Dalrymple moved his famous resolution that James Stuart had forfeited the throne of Scotland. Mackenzie, true to the last, led the opposition, and voted in the minority of five.² On the 22d it was resolved to offer the throne to William and Mary. On that day Mackenzie was not in the House.³ His public life was at an end.

¹ Act. Parl. Scot. ix. 30; MSS. Advocates' Library, 31. 3. 9; Arnot, Criminal Trials, 150-154; Brunton and Haig, 425, 426.

² Balcarres Memoirs, 35.

³ He and Tarbet were excused on the ground of illness; Act. Parl. Scot. Supplement, 70.

Mackenzie, who now found it impossible to remain in Edinburgh, felt his position bitterly. "I see not," he afterwards wrote to Lord Melville, "why lawyers of my standing (especially when I only remain of the old stock) should be forced to leave. . . . I seek no public employment, and so am rival to no man." It is said that at this time he wandered for hours about the Churchyard of the Greyfriars, and that he was seen there alone at midnight on the eve of his departure from Scotland. There were some who wished to punish him, in a marked way, for his conduct as Lord Advocate. But the tolerant principles of the Whig Government prevented this. A free pass was granted by the King, and he went to England.¹ In May he wrote to Lord Melville in the following terms:—"My bigotrie for the royall familie and monarchie is, and has been, very troublsom to mee; but though I hav been tuyce layd asyde from being King's Advocat, I will still continow firmly in both, and regrat deeply to see our just, noble, and antient government pulld to peeces, and sunk down to a condition wherin it will be neither able to defend it self or us. I was spok to stay for the Parliament, and shew my love to my countrey in opposing the Articels and Officers of State sitting in Parliament, else I wold be lookt on as a flattering courtiour; bot I told I wold abhor both; wherupon, and upon hearing surmises of what was designd against us, I left the place, but openly, and am here at Knesbrough Wells in Yorkshire, and has intimated this to our statsmen. I never did anything that deservs absconding. I punisht crimes, but committed non; and yet I will not return till things be settled, for others may want justice, though I want not innocencie."²

¹ Leven and Melville Papers, 58, 66.

² Mackenzie to Melville, Knaresborough, May 1699; Leven and Melville Papers, 32.

He never returned to Scotland. In September 1689 he reached Oxford, where he found congenial society. He was a welcome guest at the tables of both Whigs and Tories, who were delighted with his wit and learning. Evelyn, his old opponent in literature, met him at the Bishop of St. Asaph's. The party seem to have believed anything he chose to say about Scotland; and Evelyn gravely records an extraordinary account which Mackenzie gave of the origin of Presbytery. Presbytery, he said, was brought into Scotland, in the reign of Queen Elizabeth, by a famous Jesuit, who began the system of extemporary prayer, and lived many years before he was discovered!¹

After remaining at Oxford for some time he went to London, where he lived in St. James's Street till his death, which occurred on the 8th of May 1691. Absurd stories were circulated about him. It was said that he had died in agony, "all the passages of his body running blood, like Charles IX. of France, author of the Paris Massacre;" and that the physicians who attended him declared that it was no natural disease, but the hand of God upon him for the blood he had shed in Scotland. His body was brought to Edinburgh, and buried, with much pomp, in the Churchyard of Greyfriars. For a long time after, children were awed into obedience by the threat that he would rise from his grave, and persecute them as he had persecuted their forefathers; and even at a time within the memory of persons who are still alive it was a mark of courage in an Edinburgh schoolboy if he dared to go to Mackenzie's tomb, and repeat these lines:—

"Bluidy Mackenyie, come out, if ye daur!
Lift the sneck, and draw the bar!"

The news of his death was received with intense sorrow by the scattered and powerless members of that party which

¹ Evelyn's Diary, 9th March 1690.

he had so faithfully served. One verse-maker, after bewailing the loss of Lockhart and Dundee, exclaims:—

“Mackenzie’s dead,
And now there’s none to *Judge*, to *Fight*, or *Plead*.”

Sir George Mackenzie deserves a high place in the history of literature in Scotland. His industry, from the day he came to the bar until his death, was unflagging. He was the author of about thirty works, on all topics—Law, History, Politics, Morals, Heraldry. His style is artificial. He has little originality. But he is never slipshod, and he is seldom dull. As a legislator he is chiefly remembered as the author of the original Entail Act of 1685. As a lawyer, his authority was never regarded as of great weight, nor has time added to his reputation in this respect. As a politician, the facts of his life speak for themselves. The chosen task of his closing years was to vindicate the government of Scotland during the reign of Charles the Second. It was a hopeless attempt; and the reader rises from the perusal of the *Vindication* feeling that the Government must have been bad indeed for which so able a pleader can make no better defence.

At Whitehall, on the 11th of May 1689, the vacant throne of Scotland was offered to William and Mary. The Earl of Argyll, Sir James Montgomery, and Sir John Dalrymple were the Commissioners who represented the Estates at this august ceremonial.

Every placehunter in Scotland, high and low, was now on the outlook for advancement. This intense thirst for office became so inconvenient that an order was issued prohibiting Scottish officials going to London without special leave.¹ It was, however, necessary to appoint a Lord

¹ Hill Burton, *Hist. Scot.* (1689-1748), i. 19.

Advocate. Sir George Mackenzie's last appearance in the Court of Justiciary had been on the 26th of November 1688, when he concurred with the private prosecutor in a trial for murder. From that time till November 1689 almost no business was done either in the Court of Session or in the Court of Justiciary. Affairs were now resuming a more settled appearance. The office of Lord Advocate could no longer be left vacant, and Sir John Dalrymple was appointed.¹

The Convention of Estates, which had risen after settling the question of the Crown and adjusting the Claim of Rights, re-assembled on the 5th of June, and was declared to be a free and lawful Parliament.² Hamilton was Lord High Commissioner. Dalrymple took his seat as member for the burgh of Stranraer in Wigtownshire. But he soon after produced his commission as Lord Advocate, and was admitted as a member of the House by virtue of his office.³ He was succeeded in the representation of Stranraer by Sir Patrick Murray, Receiver-General for Scotland.⁴

In the hands of Dalrymple the office of Lord Advocate was almost entirely political. Lord Melville, who had been appointed Secretary of State, was in London. The Lord Advocate was the only Officer of State in the House; and the duty of representing the Government was, therefore, to a large extent thrown upon him. He was unpopular, and had to face a persistent and factious Opposition. He had held office under James. This alone was enough to provoke the distrust of the Estates. But he had also a personal enemy in the House. Sir James Montgomery was not in office. He had been sent, along with Dalrymple, as a Commissioner when the throne was given to William and Mary,

¹ His commission, under the Great Seal, is dated Whitehall, 23d May 1689.

² Stat. 1689, cap. 1.

³ Act. Parl. Scot. ix. 100; App. 127.

⁴ Parl. Papers, 1878, lxii. ii. 597.

and had ever since set his heart on being Secretary of State for Scotland. He was asked to become Lord Justice-Clerk, but refused; and when he saw Dalrymple made Lord Advocate, while he himself was left without any office, he went into opposition. He and his friends formed an association which was known as the Club. Its members were active in the work of obstructing the public business. They had frequent consultations, and in public voted together. "The Club," the Lord Advocate writes to the Secretary of State, "meets at a tavern twice a day, and orders all the north-country members; and all the malignants for fear are come into the Club, and they vote all alike."

For the purposes of faction no weapon is so useful as a popular grievance. The constitution of the Committee on Articles was justly regarded as an encroachment on the rights of Parliament. The whole functions of the Estates had gradually fallen into the hands of the "Lords of the Articles," or "the Articles," as they were usually called.¹ The Government now proposed that the Articles should consist of twenty-four members, eight chosen by each of the three Estates; and that if the Articles rejected any measure which was laid before them, it could, nevertheless, be proposed and discussed in open Parliament. Through the machinations of the Club this proposal was rejected, and a motion was carried which expressed, in general terms, the opinion of the Estates that any fixed Committee was a grievance. The same spirit which, in 1641, had torn the prerogative from the hand of Charles the First, was now endeavouring to tear it from the hand of William. But William's

1 "Not only hath the King in Scotland his negative vote, but, God be thanked, by this constitution of the Articles, hath the affirmative vote also, for nothing can come to the Parliament but through the Articles, and nothing can pass in Articles, but what is warranted by his Majesty; so that the King is absolute Master in Parliament, both of the negative and affirmative."—Private Instructions by Lauderdale to Sir Robert Murray, July 1663, Lauderdale MSS.

grasp was stronger than that of Charles ; and his Commissioner induced the House to agree to the existence of a Committee on Articles, provided that it should consist of members freely chosen by each Estate. But on one point Parliament was stubborn. From time immemorial the Officers of State had been members of the Articles without election by the House. To a continuance of this system the Estates would not agree, and, on a division, it was carried that the Officers of State should be excluded from the Articles unless specially appointed by voting. The Commissioner would not yield, and refused to give the royal assent without express instructions from the King.

At the Lord Advocate and his father a series of blows was aimed by the Opposition. Sir James Dalrymple had been President of the Court of Session under Charles the Second. Sir John had been Lord Advocate under King James. It was now proposed to declare incapable of public trust all who could be accused of conniving at the grievances set forth in the Claim of Rights. An Act for this purpose was passed by the Estates ; but the royal assent was refused. Foiled in this attempt to thrust the Dalrymples from office, Parliament, led by the Club, next claimed the right of appointing the judges. By this means it was, of course, intended to exclude Sir James from the place of President. Again the royal assent was refused. As a last attempt, the Lord Advocate was accused of having, as a Commissioner appointed to offer the Crown to William and Mary, disobeyed the orders of the Estates. It was said that by his means the Coronation Oath had been administered before the Claim of Rights had been presented, and that this was contrary to the instructions of Parliament. Every means was taken to raise a feeling against him ; and in the Parliament House one day bets of five to one were laid that he would be a prisoner in the Castle before nightfall. The

whole question, which was merely trumped up for party purposes, turned upon the meaning to be put on the instructions given to the Commissioners and the Act under which they had been nominated. It might be inferred from the instructions that the Claim of Rights was to be presented first, and from the Act of Nomination that the Coronation Oath was to be taken first. The Lord Advocate was able to persuade the Estates that he had obeyed their instructions, and that storm blew over.¹

In spite of this factious opposition the session produced one Act of great importance, by which the Episcopal Church was disestablished.² But Presbytery was not put in its place. There was thus, when Parliament rose, no Established Church in Scotland; but their Majesties declared that they would, under the advice of Parliament, "settle by law that Church Government in this Kingdom which is most agreeable to the inclinations of the People."

Parliament rose on the 2d of August 1689, and met again on the 15th of April 1690, when Lord Melville was Commissioner. The Opposition had now lost its vigour; and the session was fruitful in results. An Act was passed which settled the vexed question of the Articles. It proceeded on the preamble that the Committee of Parliament called the Articles was a grievance to the nation, and that there ought to be no Committees of Parliament but such as were freely chosen by the Estates to prepare motions and overtures for the House. The Articles were abolished, and power was given to the Estates to appoint such Committees as they thought fit. It was provided that, in all such Committees, some Officers of State should be

¹ A Letter from the Estates to the King's Majesty with the Offer of the Crown, 24th April 1689; Act nominating persons to attend their Majesties; Instructions by the Estates of Scotland to the Earl of Argyll, Sir James Montgomery, and Sir John Dalrymple; Lord Advocate Dalrymple to Lord Melville, 12th July 1689, Melville and Leven Papers, 166.

² Stat. 1689, cap. 3, 22d July.

present and take part in debates, but without the right of voting.¹

The Church question was settled by a series of Statutes. The royal supremacy over Church Courts was abolished; Presbyterian ministers were restored to the churches from which they had been expelled at the Restoration; the Presbyterian Church was established; the Confession of Faith was approved as the National Creed; and Patronage was abolished, the patrons receiving compensation.²

During this important session Dalrymple led on the Government side. The Opposition was less persistent than it had been; but no opportunity of abusing the Lord Advocate was neglected. It might be supposed, from the published orations of members of the Scottish Parliament, that stately eloquence alone was heard in that assembly. But the private correspondence and the chronicles of the time show that personalities, so popular at St. Stephen's in our own day, were not unknown to the frequenters of the Parliament Close. Hamilton, we are told, bawled and blustered; while Montgomery and Dalrymple scolded each other like watermen.³

In January 1691, Dalrymple, now Master of Stair, was appointed Scottish Secretary, along with Melville.⁴ He accompanied the King to the Hague, while Melville remained at home to manage the affairs of Scotland.

In October the Master of Stair returned to England with William.⁵ Melville was unpopular at Court. He had neither the talents nor the firmness which were needed for carrying out the tolerant principles on which the King wished to govern Scotland. Means were taken to show

¹ Stat. 1690, cap. 3.

² Stat. 1690, cap. 1, 2, 5, and 23.

³ Balcarres Memoirs, 59.

⁴ Sir James Dalrymple's patent as Viscount of Stair, Lord Glenluce and Stranraer, had been read in Parliament on 1st May 1690; Mackay, *Memoir of Stair*, p. 230.

⁵ Stair, *Annals*, i. 156.

him that his resignation was desired; he resigned his place and was appointed Privy Seal. Dalrymple's next colleague, as Secretary for Scotland, was a younger son of Archibald Johnston of Warriston. After his father's execution, James Johnston had been sent to Holland; and at the University of Utrecht he had distinguished himself as a student of law. He had afterwards been employed by the Whigs as a secret emissary while the Revolution was impending; and, after that event, he had been employed as ambassador to Berlin. As Scottish Secretary, he usually remained at home, while the Master of Stair accompanied the King. In character he seems to have somewhat resembled his distinguished father. "He is honest," says a writer of his own day, "but something too credulous and suspicious—endowed with a great share of learning—free of ceremony—would not tell a lie for the world—very knowing in the affairs of foreign States, and the Constitutions of both kingdoms."¹

In February 1692 the Massacre of Glencoe took place. The Master of Stair was in England at the time. It was not till April that the Paris Gazette published the news to the world.² In Edinburgh it was known in March that the Macdonalds had come to an untimely end.³ But there was no popular excitement on the subject, and the Master of Stair continued to hold, unmolested, the offices of Scottish Secretary and Lord Advocate.

To the legal duties of the Lord Advocateship the Master of Stair paid little attention. In August 1690 he had appeared for the Crown in the Court of Justiciary; but from that time till the autumn of 1692 he devoted himself entirely to his duties as Scottish Secretary. The legal work of the Crown was conducted by various persons. Hew Dalrymple, the Lord Advocate's brother, appears on the record, in

¹ Carstares State Papers, 93.

² Macaulay, Hist. Eng.

³ *Ibid.*

November 1690, as “substitute to their Majesties’ Advocat,” and continues to represent the Crown, with the assistance of various counsel, till April 1691, when Sir William Lockhart, the Solicitor-General, takes his place. The Solicitor thereafter prosecutes; and when he is not present various members of the bar appear for him, under the designation of “Assessors to their Majesties’ Solicitor.”¹

A few months after the Massacre of Glencoe the Master of Stair resigned the office of Lord Advocate. Sir John Lauder of Fountainhall, it is said, was asked to fill the vacant office, but declined. There is a tradition that he did so on the ground that he was refused leave to institute a prosecution against those who had murdered the Macdonalds of Glencoe.² A more probable reason is that he was already a judge of the Court of Session and of the Court of Justiciary.

On the 28th of November 1692 a new Lord Advocate was appointed. This was Sir James Stewart, an advocate who had been at the bar for thirty-one years, which he had spent in adventures of no ordinary kind.

¹ Books of Adjournal, Aug. 1690—Nov. 1692.

² The only authority for this tradition about Sir John Lauder appears to be an anonymous note scribbled on the title-page of an old pamphlet in the Advocates’ Library.—Pamphlets, Advocates’ Library, 146.

CHAPTER IX.

SIR JAMES STEWART.

JAMES STEWART, who followed the Master of Stair in the office of Lord Advocate, was the son of Sir James Stewart of Kirkfield and Coltness, Lord Provost of Edinburgh. The Provost was twice married, first to Anna Hope, niece of Lord Advocate Sir Thomas Hope, and secondly to Marion M'Culloch of Goodtrees. The first Lady Stewart was the mother of James, the future Lord Advocate. "It was not," we are told, "her being niece to Thomas Hope was the motive induced the marriage, but her intrinsick virtue, with her prudence to conduct a family, and their loves were mutuall and recipocall. A trifling story may illustrate this, and that plain downright ingenuity of these times. I have heard that James Stewart, when exercising his agility near where Heriot's Hospitle was then building, and in jumping across a draw-well, now the covert well in the middle of the square (his mistress was by accident walking at some little distance), in this youthfull frolick, his hat struck on the pully of the well, and dropt into the pitt; he escaped, as was said, a great danger, and Anna, hearing of this accident, in surprise fainted away. They made some innocent mirth after, and she was by this discovered to be James Stewart's sweetheart; by this name a mistress was then called."¹ They were soon after married, and had a

¹ Denham Memoir, Coltness Collections, 17. "At this time he was one-and-twenty, and she about a year younger. They were wedded in about a year after,

family of six children, five sons and one daughter. James Stewart, the third son, was born in 1635, and called to the bar on the 28th of November 1661.

The Lord Provost's conduct during the Commonwealth brought him into trouble at the Restoration, and influenced the whole course of his son's life. Sir James Stewart had been chosen Lord Provost of Edinburgh in 1648, and held this office until Cromwell's invasion. At this time the loyalty of the Edinburgh Town Council ebbed and flowed according as the fortunes of Cromwell or of Charles were in the ascendant; and the Chief Magistrate moved backwards and forwards with the tide. In October 1648 he sent a party of bailies down the Canongate to welcome Cromwell. In May 1650 he was present, as a magistrate, at the execution of Montrose. In July 1650 he went to Fife to salute Charles the Second.¹ The defeat of the Scottish army at Dunbar put an end to all possibility of further trimming; and from the 2d of September 1650 till the 5th of December 1651 Edinburgh was without a Town Council. The Provost was advised by the Committee of Estates to leave the city, and go into retirement. He did so, and disappeared from public life till towards the close of the Commonwealth. He was then made Lord Provost for the second time, and was in office when the Restoration took place. The Town Council despatched to Charles an address, signed by the Lord Provost in name of the Council, in which they exclaimed, "Bless the Lord for raising up such a Plant of Renown, as your Majestie, to repair our Breaches."² This ostentatious loyalty procured substantial favours for

and his mother's brother, James, first Lord Carmichael, the Lord Treasurer-Depute, on his part, and Sir Thomas Hope, Lord Advocate, for her, takes burthen on him, for the conditions on his niece's parte, for Anna's father was now some time dead."—*Ibid.* The author of the "Memorie of the Somervills" describes the Lord Advocate's niece as "one Anna Hope, that then keepest the greatest, if not the only worst shope in Edenburgh." *Memorie*, ii. 380.

¹ Coltness Collections, 338.

² Maitland, *History of Edinburgh*, 96; Coltness Collections, 339.

the city; but Sir James Stewart was under a cloud. His Presbyterianism was well known. A Bible, it was said, lay in every room of his house. He was, therefore, a hypocrite, and a man to be distrusted. He was soon dismissed from the Provostship, and a warrant was issued for his arrest, along with Johnston of Warriston and Sir John Chiesly. Warriston escaped, but Stewart and Chiesly were taken and sent to the Castle.

Various charges were brought against Stewart, and for these a fine of five hundred pounds was imposed upon him. But worse remained behind. A charge of treason was brought against him, and his life was in danger. He had, luckily, a friend at Court in Sir Archibald Primrose, the Lord Clerk Register. Primrose, ever the friend of a rich man in distress, implored Charles to pardon Stewart. His Majesty refused. But Primrose was importunate, declaring that Stewart had been misrepresented, and that if he himself had done any service to his King, "it was owing to Provost Stewart, who had saved his life after the action at Philiphaugh."¹ His request being at last granted, he rewarded himself for his generosity to the man who had saved his life by obtaining a gift of his fine, and started for Edinburgh.

Stewart was released; but his troubles were not ended. He was again arrested, this time on a charge of embezzling funds which had come into his hands as Receiver-General for the army in Scotland. It was soon found that the charge was groundless, and that, in point of fact, a balance was owing to him by the Treasury. But ten years passed before the charge against him was withdrawn. Lauderdale and Lord Advocate Nisbet did not stick at trifles when money was concerned. Their terms were a prosecution for treason, or a payment of one thousand pounds and a free pardon. There was no alternative but to submit. Primrose told Stewart it was the only way to save himself and his family from ruin. He

¹ Denham Memoir, Coltness Collections, 37.

gave up all claims against the Government, paid the thousand pounds, and obtained his freedom. This was in 1670.¹

Young James Stewart had worked night and day to save his father; and the sinister eye of the Government was now turned upon him. He was a man to be carefully watched. No law-agent would dare to employ an advocate on whom the judges frowned. He lost all hopes of practice, became disgusted with his profession, and left the bar, little thinking that he would return and wear the silk gown of the Lord Advocate.

What James Stewart had done on behalf of his father was not the only cause of his retirement. During the time old Sir James was in trouble, the Pentland Rising had taken place; and young Stewart's resentment against the Government had led him to correspond with the insurgents, a rash step which might at any moment have cost him his life. Soon after the failure of that movement, a Presbyterian clergyman named Stirling published the well-known volume called "*Naphtali*," in which the grievances of the nonconformists were narrated. It contained many dying speeches and "testimonies," among which were those of Warriston and Guthrie. But part of it consisted of an examination of the Acts of Parliament relating to Church affairs. Stirling did not trust himself to discuss questions of law. He confined himself to the Gospel, and Stewart gave the Law. "*Naphtali*" was answered by "*A Survey of Naphtali*," from the pen of Bishop Honeyman of Orkney, a prelate who had already appeared in print as the champion of Conformity. Under the assumed name of "*A Friend to true Christian Liberty*," Stewart replied to the arguments of the Bishop in a work which he called "*Jus Populi Vindicatum*." This title was itself enough to bring the author to the scaffold. Indeed, had either his correspondence with the Pentland insurgents or his connection with "*Naphtali*" and the

¹ Denham Memoir, Coltness Collections, 38, 39.

"Jus Populi Vindicatum" been discovered, Stewart's life would not have been worth a week's purchase. He had, therefore, very strong reasons for leaving Scotland, in addition to the fact that he had no practice at the bar.¹

The old Provost, whose spirit had not been crushed by misfortune, was opposed to his son's project of leaving the bar. But James Stewart had made up his mind, and went to Rouen, where he became a merchant, passing under the name of Graham. In a letter to his father, explaining his reasons for going abroad, he says, "In this I am most serious, that it is only the intolerable weariness of drudgery and idleness that have engaged me to this undertaking, and that I seek nothing but to live quietly and honestly, and lastly that I shall never be wanting to serve God in this place, upon the call of the best promising opportunity."²

After four years he returned to Scotland. In 1675 a pamphlet appeared under the title of "An Account of Scotland's Grievances, by reason of the Duke of Lauderdale's Ministry." It was a short but pointed attack on the Government. Stewart was said to have had a hand in writing it; and a warrant was issued, ordering "James Stewart, son to Sir James Stewart, late Provost of Edinburgh, to be apprehended, wherever he is, with all his books and papers whatsoever, and made close prisoner in Edinburgh, and no communication to be allowed him with any living by word

¹ Naphtali, or the Wrestlings of the Church of Scotland for the Kingdom of Christ, 1667; A Survey of the Insolent and Infamous Libel entitled Naphtali, etc., 1668; Jus Populi Vindicatum, or the People's Right to defend themselves and their Covenanted Religion vindicated, 1669; Wodrow, *Analecta*, ii. 327, iii. 23; Coltness Collections, 366. "Naphtali" was translated into Dutch, and published at Rotterdam in 1668, under the title of "Historie der Kerken Van Schotland tot het jaar." The fact that Stewart and Stirling were the authors of this work was not known for some time. The Rev. Robert M'Ward, Minister of Glasgow, who was, in 1661, banished to Holland, where he published Samuel Rutherford's Letters, was supposed to be the author.—Steven's History of the Scottish Church in Rotterdam, p. 73; Catalogues of Scottish Writers (Edin. 1833), p. 41.

² Wodrow MSS., Advocates' Library, vol. 58, Letters Nos. 64 and 65 (commencing "Mr. Graham, Sir"); Coltness Collections, 360.

or writ." But he got a hint of his danger, and escaped. The Magistrates of Edinburgh were commanded to hunt the town for him. His trunks were opened, and his papers seized; and a troop of horse was sent to search Coltness, the country house of his eldest brother, Sir Thomas. He was, however, beyond pursuit; and, taking the name of Lawson, he moved about from place to place till the year 1679.¹

It is not known where Stewart was during the whole of this period of hiding; but in 1678 he was in London. There he supported himself, for a short time, by practising the law in a very curious way. He was an unknown fugitive who dared not give his name nor let it be known that he was a lawyer from Scotland. But he opened a small office in an obscure street near the legal haunts of the day, and offered to "salve intricat law caises of any kind at half fees, or half a guinea." He never went to his office himself; but he had with him a faithful clerk, one Thomas Spence, a Scotsman. Spence met clients at the office, received their papers, and carried them to Stewart. Stewart wrote his opinion, which was given to the client by Spence, who received the fee and brought it to his master. It appears that, in this instance, cheap law was not bad law, for the advice of the mysterious counsel was eagerly taken. But questions began to be asked about the unknown jurist. On this Stewart left his hiding-place and went to another; the office was found closed; Spence vanished; "our law oracle was silenced."

In spite of the care with which Stewart concealed himself, it seems that the Lord Advocate, Sir George Mackenzie, knew where he was. This appears from a curious story which has been preserved by Wodrow. One evening in London, Mackenzie was in the company of an English and

¹ Harleian Miscellany, vi. 373; Coltness Collections, 363; Wodrow MSS. vol. 58, Letter No. 100; vol. 59, Letter No. 66.

a Scottish Bishop, who were disputing about the merits of their Churches. The English Bishop defended the ritual of the English Church; the Scotsman defended the service of the Scottish Episcopal Church, in which not even a Liturgy was used. Mackenzie joined in the argument, and supported his own Church. It was arranged that they should meet again and have a full debate on the subject. The English prelate was to bring two friends to help him; and the Lord Advocate and the Scotsman were to find some one who would take their side of the question. The Scottish Bishop had a great respect for the learning of his opponent, and feared that neither he nor Sir George would be able to hold their own, and that they would find no one in London to assist them. "Don't be afraid," said Mackenzie; "I have my eye on a Presbyterian who is hiding here, and who knows all about it." Accordingly when the appointed time came Sir George arrived, bringing with him a person whose name he did not mention, "in a very negligent mean attire," but who, he said, was to take part in the discussion. An English Bishop began and silenced the Scottish Bishop; then Mackenzie spoke, and was being driven from point to point, when the stranger came to the rescue, and, the story goes, defeated all the three Englishmen. It was James Stewart, but his name was not given. He and Mackenzie left together; and when they had parted in the street, the prosperous politician from the outcast in his mean attire, we may imagine Sir George quoting from his own *Essay on Solitude*, "Life is a *Comedy*, in which every man must act his part."¹

Once, while Stewart was in hiding, a writer to the Signet, who wished to have Sir George Lockhart's opinion on a point of law, employed Stewart, whose haunts he knew, to state the case to be laid before the great lawyer. "After Sir George had read it over, he paused some time, and,

¹ *Analecta*, iii. 257, 258.

looking broad, said, ‘Sir, tell me plainly, without shifting, is this your doing, or not, for, by God, if James Stewart is in Scotland or alive, this is his draft, and why did not you make him solve your difficulty?’ The agent smiled, and said, ‘My Lord, I did, but wanted your Lordship’s authority too;’ and, when James Stewart’s solution was shown, Sir George was so pleased that he caused make a copy to take *in retentis* with him.”¹

In 1679 James Stewart returned to Scotland. He had nothing to fear from the Lord Advocate; and Lauderdale was not so powerful as he had been ten years before. But soon after the passing of the Test Act he was again in trouble. In December 1681 Argyll’s papers were searched, and among them was found a memorandum in Stewart’s handwriting reflecting on the Government. A warrant for his arrest was privately issued; but he heard of his danger, probably by a hint from Sir George Mackenzie, and at once made his escape. The seven great Officers of State summoned Argyll’s counsel, and demanded if they knew anything of the memorandum which had been found; but none of them had ever seen it.²

Other members of the Stewart family were now in trouble. Old Sir James died in March 1681. Since 1670, when he had been released from prison, the family had, with the exception of James, lived a quiet life. But now a criminal charge was brought against Sir Thomas, the Provost’s eldest son, who had succeeded to Coltness. His house was only three miles from Bothwell Bridge. A band of the insurgents had come and carried away two roast turkeys from the kitchen; and one of his servants, now in exile, had fought against the royal troops.³ At that time, these facts were enough to cost Stewart his life. Sir George Mackenzie

¹ Coltness Collections, 364.

² Fountainhall, Decisions, i. 168.

³ Denham Memoir, 81.

sent for Robert Stewart, brother of the laird of Coltness, and said, "I know as much against Coltness as will hang any man in Scotland, and there will be a warrant to apprehend him in less than eight-and-forty hours; but if you, Robin, propel this, I will manswear it, for it is contrary to my office to put rebels on their guard." This hint was taken, and Sir Thomas fled to Utrecht, where he was soon after joined by Lady Stewart.

During the eventful years which immediately preceded the Revolution Utrecht shared with the Hague the honour of being a city of refuge for politicians who had fled from England and Scotland. Here the laird of Coltness found his brother James, one of that strange colony of exiles which had been brought together by the arbitrary policy of the English Government. They were an interesting group of men: Ward, the exiled Mayor of London; Wilmer, foreman of a jury which had ventured to throw out an indictment for treason; Gilbert Burnet, whose writings shed so much light on the times in which he lived; Carstares, whose sound judgment was afterwards of so much service to King William; Argyll, listening to the unwise counsels which led him to ruin; Melville, Secretary of State for Scotland after the Revolution; and three generations of the house of Stair,—Sir James Dalrymple, the great jurist, who had been exiled on account of the Test; his son, Sir David Dalrymple, afterwards Lord Advocate to Queen Anne, but now a youth studying law under Grævius; and John Dalrymple, grandson of the President, afterwards Field-Marshal in the reign of George the Second. These, and many others, crowded the English coffee-house on week-days, and on Sundays listened to the sermons of Burnet or the Dutch pastor Best.¹

¹ Denham Memoir, 78; Macaulay, *Hist. Eng.* ii. 458, 459; *Memoirs of Calamy*, i. 140-147; *Memoirs of Howe*, 127

It is uncertain what part Stewart took in the consultations which preceded Argyll's campaign in Scotland. A meeting of Scotsmen was held at Amsterdam in April 1685, at which he was present. It was then that the unfortunate expedition was resolved on. According to one account, Stewart was against the proposal, or at least thought it was premature.¹ According to another account, the resolution to invade Scotland was unanimously adopted.² Argyll's mind was, however, made up; and to Stewart was intrusted the onerous task of preparing a declaration of war. He penned the "Declaration and Apology" which was issued when Argyll landed in Scotland.

It is not wonderful that, soon after this, sentence of death in absence was pronounced against Stewart by the High Court of Justiciary. In 1684 the Lord Advocate had been directed to raise a prosecution against him, the charge being that by writing and speaking he had stirred up the lieges to sedition.³ He was now accused of treasonably consulting and contriving the Earl of Argyll's rebellion. A jury was impanelled. Witnesses were examined, who proved that he was constantly engaged in consultation with Argyll. He was found guilty, and sentenced to be executed whenever he could be found.⁴ The Lord Advocate, when sentence was pronounced, called out, in the hearing of the jury, "This family are not Stewarts! Their father, Provost Stewart, was a Macgregor, and changed his name when he came to town, because of the Act of Parliament. These forefault Stewarts are damned Macgregors!"

In the following year Penn arrived in Holland on a mission to the Prince of Orange, but failed to persuade William that King James was the most tolerant monarch in

¹ Denham Memoir, 85.

² Wodrow, iv. 283.

³ Regist. Secreti Concilii, 3d December 1684.

⁴ Books of Adjournal, 16th July 1685.

Christendom. The famous Quaker, on this occasion, met James Stewart and his brother. They discussed questions of theology, and Penn nicknamed Thomas Stewart "Gospel Coltness." But he marked the talent of James, made inquiries about him, and on his return to England told the King that James Stewart could be of use, through his influence with the Presbyterians. Stewart received a free pardon for his accession to Argyll's rebellion and a promise of protection. He was invited to London, and agreed to go. But on the eve of his departure from Holland he went to the Hague and had an interview with the Prince of Orange, to whom, according to Burnet, he promised inviolable fidelity. What passed between them will never be known; but it is probable that Stewart gave the Prince assurances that he would remain true to the principles of civil and religious liberty.

"Upon his coming to Court," says Burnet, "he was caressed to a degree that amazed all who knew him."¹ He did all in his power to persuade his countrymen that the King was really in favour of religious freedom, and that they should petition him for a general toleration, even although it would include the Papists.² But, in spite of all he had endured for the cause of Presbytery, he could not convince the nonconformists of Scotland that the King was sincere. He was looked upon with suspicion, was thought to be trimming, and was known by the name of "Wily Jamie."³

It is, indeed, impossible to understand the conduct of Stewart at this time. No means exist for explaining the motives by which he was actuated. He had suffered much at the hands of the reigning family. His father had been

¹ Burnet, *History of His Own Times*, ii. 448.

² *Marchmont Papers*, iii. 73.

³ "I have been called a Court agent;" Stewart to Carstares, 8th October 1687, Wodrow MSS. Advocates' Library, 8vo, xxx.

fined and imprisoned. His brother had been driven into exile. He himself had lived for years as an outcast in danger of his life. Yet now, apparently, he believed that under a Stuart King the liberties of the nation might be secured.

Either because he had persuaded himself that the soundest policy was to accept the toleration which was offered by James, or for some other reason which cannot now be discovered, he wrote a number of letters to Carstares, who was at the Hague, in which he expressed a strong opinion that the Prince and Princess of Orange should agree with the King's measures, and requested information as to their views on the repeal of the Penal Laws and the Test.

Such was the general purport of his letters ; but now and then he took occasion to give Carstares significant hints of the state of matters in England. In one letter he says, " I am certainly told the King cannot trust his forces, at present, either in England or Scotland." In another he says, " I cannot but think that great confusions are coming upon England ;" and adds, " Nor do I indeed apprehend that the way of our deliverance is as yet within any man's view, further than to believe that the Lord who cometh will come, and will not tarry." ¹

These letters were a genuine service to the Prince of Orange. They were handed to the Grand Pensionary Fagel, who answered them in a letter which, though short, was a State paper which the people of England regarded as a declaration of the principles by which the peace of the nation could be secured. Their Royal Highnesses, Fagel said, were in favour of repealing the penal laws, but against repealing the Test. They would thus support toleration, but would defend the Established Church by excluding Papists from office. The Grand Pensionary's letter was

¹ Wodrow MSS. Advocates' Library, 8vo, xxx.

translated into English by Bishop Burnet, and circulated all over Great Britain.¹

Melfort, brother to the Chancellor Perth, was now Secretary of State for Scotland; and Stewart, despite the remonstrances of the Episcopal clergy, who regarded him as a traitor in their midst, was deep in the confidence of Melfort, who employed him in the preparation of public documents.² He went to Scotland, and, though many of his friends looked coldly upon him on account of his connection with the Government, began to practise at the bar.³ To the disgust of Sir George Mackenzie, Stewart was appointed to act with him in conducting Crown prosecutions.

At the crisis of the Revolution Stewart was in London. Orders were sent down to Edinburgh, by the Secretary of State, that all the regular troops should march into England. The authorities in Scotland raised objections; but Melfort sent a peremptory order, which, it is said, "was positive and short, advised by Mr. James Stuart at a supper, and

¹ A Letter writ by Mijn Heer Fagel, Pensioner of Holland, to Mr. James Stewart, Advocate, giving an Account of the Prince and Princess of Orange's Thoughts concerning the Repeal of the Test and the Penal Laws: Pamphlets, Advocates' Library, 567; Burnet, History of His Own Times, i. 448-450. Copies of Stewart's letters to Carstares are preserved in the Advocates' Library, Wodrow MSS. 8vo, xxx. They bear the following docquet: "The above letters of Mr. Stewart, late Lord Advocat, are copied from the originals, and collated by R. Wodrow." Burnet represents Stewart as having written to Fagel. But this is a mistake, for in a letter to Carstares, of 8th October 1687, he says, "I had certainly long ere now written to Pensionary Fagel, were it not that I judged you were a better interpreter of anything I could say;" and in his answer to Fagel (dated 8th May 1688) he says that he wrote to "a private friend," adding, "To your Lordship I never sent nor directed any." Pamphlets, Advocates' Library, 263.

² Balcarres Memoir, 3. "His office obliging him to draw the State Papers, he filled them with high strains of the absolute power of the King, either from the affectation of loyalty natural to a new convert, or, by refinement of revenge, to throw odium upon the Sovereign he had formerly opposed."—Dalrymple, Memoirs, i. 96.

³ "James Stuart, son of Provost Stuart, puts on the gown again as an advocate, having been in and out in a floating condition, ever since the Declaration in 1663." This was 17th January 1688.—Fountainhall, Chronological Notes, 243.

wrote upon the back of a plate, and an express immediately despatched therewith.”¹

After the Revolution Stewart remained in Scotland. He had no seat in the important Parliament of 1690, but was not a mere spectator of public events. He was one of the chief advisers of the Whig party in Scotland, and prepared the famous Act by which Patronage was abolished. The measure was brought into Parliament by his brother Thomas, who was now member for the burgh of North Berwick. His influence with the Church was completely restored; he was the ablest lawyer at the bar; and his advice on State affairs was found of the greatest importance by Government. It was, therefore, evident that promotion awaited him.

During the years 1689 and 1690 he was retained for the Crown in various causes; and when the Master of Stair resigned he was appointed Lord Advocate in November 1692. On the 26th of December he produced his commission, and took the oaths in the Court of Justiciary; and on the same day he appeared for the Crown along with a private prosecutor.²

In the beginning of the following year a case of some importance was decided, in which Stewart was a party as King's Advocate. A question was raised as to the right of the Lord Advocate to appear in civil cases, for the King's interest, without a special mandate or warrant from the King. The Court held that he could not do so, “there being only two cases in which he could quarrel the subject's right, either by giving his concurrence to actions of one subject against another, or when he had a mandate from the King to that effect; otherwise he might vex all the lieges with processes, and open their charter chests.”³

¹ Balcarres Memoir, 11, 12.

² Books of Adjournal, 26th Dec. 1692.

³ King's Advocate v. Moncrieff, 11th Jan. and 2d Feb. 1693.—Fountainhall, Decisions, i. 543, 553; Morison, Dictionary of Decisions, 7905. The law on this

In April 1693 the Estates met. The Master of Stair was on the Continent, as Scottish Secretary-in-waiting on the King. Johnston attended in Parliament. On the first day of the session Stewart produced his commission as Lord Advocate, and, after it had been recorded, took his seat as a member *ex officio*.¹ An Act was passed "settling the orders in the Parliament House." Penalties were imposed on members for absence without leave; noblemen being fined twelve pounds Scots for each sitting at which they did not appear, barons six pounds, and burgesses three pounds. Members coming into the House after the roll had been called were also fined. No person, not a member of the House, was permitted to be present among the members. To this rule, however, an exception was made in favour of the eldest sons or heirs of peers, judges of the Supreme Court, the King's Agent, and a few officials. The Lord Chancellor and the Lord Advocate were allowed to have one servant each in attendance. Strangers found in the House were to be fined for the first and imprisoned for the second offence. The Officers of State were to sit, as of old, on the steps of the throne. After business began, all were to remain seated; no standing or walking about being allowed. All speeches were to be addressed to the Chair; and no one might speak more than once in the same debate without special leave. No member was to leave the House until the sitting was adjourned. These rules, which were held to be very severe, had been framed in anticipation of a stormy session. Once there was an angry debate on the

point was further developed in the case of the Earl of Breadalbane *v.* King's Advocate, 25th July 1735 (Mor. Dict. 7905) and Lord Advocate *v.* Lord Dunglas, 24th Dec. 1836 (Shaw, Court of Session Reports, xv. 314; 1 Bell's Appeals, 537). The matter is now regulated by Statute. All actions in Scotland on behalf of the Crown, or any public department, are raised in the name of the Lord Advocate, 20 and 21 Vict. cap. 44 (1857).

¹ Act. Parl. Scot. ix. 242. The Officers of State during this session were the Secretary, Clerk Register, Advocate, Justice-Clerk, and Treasurer-Depute.

favourite subject of precedence among the Officers of State ; the Lord Clerk Register having named himself before the Secretary. The error was rectified, and the House gave orders that the Lord Advocate and the Lord Justice-Clerk should, in future, be always present at the preparation of the minutes. Otherwise the proceedings were quiet and uneventful.

During this session Lord Advocate Stewart brought in and passed two Acts, of a very useful kind, to reform a flagrant abuse in the procedure of the Civil and Criminal Courts. It had been the policy of the Stuarts to cover the Court of Session and the Court of Justiciary with a veil of mystery. A practice had arisen, which had received the sanction of Parliament, of concealing from the lieges the judgments pronounced in civil cases. It had even become usual to deprive suitors of their right of hearing their own cases decided. This bad custom was now abolished by an Act, the principle of which was that every citizen has a right to know all decisions given by the judges of the land. The only restrictions on the right of the public to be present in Court were, that the judges were not to be interrupted when giving their opinions, and that, in some special cases, probably those of a scandalous or indecent description, only the litigants and their legal advisers might appear.¹ A similar enactment was made as to criminal trials. One of the memorable Statutes of 1587 had provided that all the steps of a prosecution should take place in presence of the accused.² Yet, not only had trial in absence been introduced in cases of treason, but, in ordinary prosecutions, a system had arisen of giving judgments on points of criminal law with closed doors. This was now declared to be illegal, on the ground that it was "fit and convenient for the lieges that criminal trials, which are of so great import, be solemn

¹ Stat. 1693, cap. 26.

² Stat. 1587, cap. 91.

and public." Power was, however, given to the judges, at trials for rape, adultery, and certain other offences, to exclude the public.¹

The Estates, which rose on the 15th of June 1693, did not re-assemble for two years. In the meantime the tempest was brewing against the Master of Stair. His enemies had, for some time, been using every means to procure a Commission of Inquiry into the affair at Glencoe; and the Jacobites were aware that a serious blow might be struck at the Secretary, and, through him, at the Government. Fearing his eloquence, and in order to deprive him of the means of self-defence, they concealed the fact that the question was to be raised at once. The Master of Stair left England with the King, and the Parliament of Scotland met in his absence on the 9th of May 1695. The Marquis of Tweeddale was Lord High Commissioner. On the 21st a motion was made for an inquiry into the Massacre of Glencoe, and Tweeddale announced that commissioners, appointed by the King, were to meet that afternoon to commence an investigation.

The Lord Advocate was a member of the Glencoe Commission, and probably prepared the report, with the assistance of the Solicitor-General.² This report is the best account of the melancholy tragedy which it describes. State papers which narrate striking events are often picturesque and graphic. Such is the report of the Glencoe Commission. It has furnished every historian who has written of that period, with the horrors which have been so often and so eloquently described. The evidence is well arranged, and the witnesses were evidently examined minutely and with great pains. An inquiry into what Parliament has declared

¹ Stat. 1693, cap. 27.

² The Hon. James Ogilvy, second son of James, third Earl of Findlater. He became Solicitor-General in 1693, Secretary of State for Scotland in 1695, Viscount Seafield 1698, Earl of Seafield 1701, Lord Chancellor 1702. Died 1730.

to be a "national concern" need not be guided by the rules of evidence which Courts of Law apply to ordinary criminal cases. Nevertheless, much of the oral evidence received by this famous Commission was mere hearsay, and on it alone no decision could have been given against Stair. But the documentary evidence, with which every student of history is familiar, proved fatal, and gave the Commissioners what they wanted, the means of condemning Stair. When a wrong has been done, when a King and a subject are on their trial for that wrong, and when the King can be acquitted by the condemnation of the subject, that condemnation is sure to be pronounced. The report was soon ready, and was sent to William. The Government, it seems, wished to withhold it for a time. But a number of members pressed for its production, and on the 24th of June it was laid before the Estates.

The discussions at once began. Hew Dalrymple, brother to the Master of Stair, and a member of Parliament, wrote a paper which he circulated through the House, under the title of "Information for the Master of Stair." It was a defence of the Secretary of State, in which it was maintained that he was innocent of the mode in which his orders against the Macdonalds had been carried out, and that it was not proved that he knew M'Ian had submitted. The Estates called Dalrymple to the bar of the House. It was agreed "that first the author and the print be censured; and Mr. Hew be ordered to ask his Grace and the Parliament pardon." This he did, "declaring that what was offensive in that paper had happened through mistake." The "Information" was declared false and calumnious, and the Lord Advocate was directed to answer it.

The Advocate's Answers bear to have been "written by Thomas Spence, and corrected by Sir James Stewart, his master." This Thomas Spence, it may be assumed, was the

clerk who, long before, had shared Stewart's misfortunes, and who was with him when he opened the mysterious law office in London.

Mr. Hew's conduct was soon forgotten. The debates went on till, on the 10th of July, the well-known address to the King was adopted. The Master of Stair was condemned on the ground that his letters had exceeded the King's instructions, and his Majesty was requested to "give such orders about him for vindication of your Government, as you in your royal wisdom shall think fit." As for the real actors in the massacre, the King was requested to send them home, and direct the Lord Advocate to prosecute them. Stair resigned. Had the massacre taken place on a barren Lowland moor instead of in a picturesque Highland glen, and had the men who did the deed not been so treacherous, little would have been heard of it in our own day. At the time, had there been no party object to serve, the destruction of a few Highland robbers would have passed unnoticed. The clamour about the massacre began as a mere party cry. Almost every month during the reign of Charles the Second had seen as brutal and as treacherous outrages committed on persons whose only crime was non-conformity; and those who most loudly condemned Stair were those who had most loudly applauded Claverhouse.

In the following year Stewart conducted a prosecution which ended in a tragedy as pitiable as the massacre of Glencoe. During the last session of Parliament the Estates had ratified an Act against the crime of blasphemy passed in the first Parliament of Charles the Second. Under the Act of Charles, the punishment of death was to be inflicted on any one who cursed or denied God, or any of the Persons of the Blessed Trinity. The Statute of 1695 went further, and rendered it criminal to speak against the being of God or the authority of the Bible. A lad named Thomas Aiken-

head, the son of a disreputable apothecary in Edinburgh, was brought before the Privy Council on a charge of blasphemy. The Council remitted the case to the High Court of Justiciary, and ordered the Lord Advocate to prosecute the accused. The indictment charged Aikenhead with a contravention of the Acts against blasphemy. He was said to have frequently ridiculed the Bible and railed at the Saviour. He had called the Old Testament Ezra's Fables, "by a profane allusion to Esop's fables." He called the New Testament "The History of the Impostor Christ." Christ, he said, had learned magic in Egypt, "and, coming from Egypt into Judæa, he picked up a few ignorant blockish fisher fellows, whom he knew, by his skill in phisognomie, had strong imaginations, and by the help of exalted imagination, he played his pranks." The doctrine of the Trinity was, he maintained, beneath contempt. The Incarnation was an impossibility. Mahomet, he declared, was to be preferred to Jesus. In cold weather he had said he would like to warm himself in hell. Before the day of trial the prisoner had repented of these impious ravings. He presented a petition to the Court of Justiciary, in which he declared his belief in the doctrines of Christianity. He denied that he had made the statements set forth in the indictment as his own opinions; but confessed that he had repeated arguments which he had read in the writings of atheists. He implored the judges to consider his youth, and desert the diet against him. He pleaded in vain. On the 23d of December the Court met. Lord Justice-Clerk Cockburn and the pious Lauder of Fountainhall were among the judges. The Lord Advocate appeared for the prosecution. There was no counsel for the defence. The jury, most of whom were Edinburgh bailies, were sworn. Five students, the eldest of whom was twenty-one, were examined as witnesses. They proved some of the charges; but of the

capital offence there was no direct evidence. Nevertheless the jury returned a verdict of guilty, and Aikenhead was at once sentenced to death. Efforts were made to save him, or at least to gain for him some time to prepare for death. The execution had been fixed for the 8th of January. On the 7th the Privy Council sat. That fact is recorded in the Register of Council, but what was done is passed over in profound silence. It was known, however, that the case of Aikenhead was discussed, and that mercy was refused only by the casting vote of Lord Polwarth, who presided. Stewart was present, but there are no means of knowing on which side he voted. The wretched victim of intolerance was executed on the 8th of January 1697.¹

The condemnation of Aikenhead was the result of the harsh spirit of intolerance which, at that time, possessed the clergymen and lawyers of Scotland. But, on the other hand, Stewart's term of office produced a Statute which threw a safeguard around the liberties of the people. The power of accusing a man and casting him into prison was one of the most powerful weapons in the hands of the Lord Advocate. In the case of private prosecutions, the Court was very ready to listen to any complaints that were made by persons who were lying in prison; and if the prosecutor did not proceed within a reasonable time, the judges either released the prisoner at once, or made the prosecutor state when he intended to go on with the case. But it was different with prosecutions at the instance of the Lord Advocate. Persons were frequently cast into prison, and, as there was no law which compelled the public prosecutor to proceed within a given time, were kept in durance for long periods. During the years between the Restoration and the Revolution this evil had become more and more

¹ Books of Adjournal, Justiciary Office, Edinburgh; Hume, *Crim. Com.* i. 570; Stat. 1661, cap. 21; Stat. 1695, cap. 11; *State Trials*, xiii. 917; *Regist. Secreti Concilii*, 7th Jan. 1697; Macaulay, *Hist. Eng.* iv. 781-784.

aggravated. The unhappy victims of religious persecution were, indeed, the chief sufferers. But many others lay for a long time in prison, if it did not please the Lord Advocate to bring them to trial. In England the liberty of the subject was protected by the Habeas Corpus Act of Charles the Second. In Scotland the Privy Council had ordained that the Lord Advocate must, if called on to do so, state the charge on which he committed a prisoner to jail; nor were jailers bound to receive prisoners except on cause shown. But there was no limit to the time which a prisoner might be detained without trial. The Claim of Rights had declared that "imprisoning persons without expressing the reason thereof, and delaying to put them to trial, is contrary to law." In 1701 Stewart prepared and carried through Parliament an Act to remedy these evils.¹ Under this Statute, which has been called the Habeas Corpus Act for Scotland, every prisoner must receive a copy of the warrant for his imprisonment, and of the petition on which the warrant was granted. This enables him to prepare his defence. He can also force the Lord Advocate to bring him to trial. The means provided for this purpose are simple. The accused, as soon as he is imprisoned, may apply for "Letters of Intimation" to his accusers, directing them to fix, within sixty days, a day of trial. The judge to whom the application is made must, within twenty-four hours, issue the required Letters of Intimation. If no indictment is served within sixty days, the prisoner must be liberated. If the prosecutor serves an indictment, the trial must be concluded within forty days after the expiry of the sixty days. If the trial is commenced but not finished within the forty days, the prisoner must be acquitted. If the trial is not commenced within the forty days, the prisoner must be

¹ Stat. 1701, cap. 6 : Act for preventing wrongous Imprisonment and against undue Delays in Tryals.

set at liberty ; but he may be prosecuted under another form, called Last Criminal Letters. The effect of these provisions is that no one who has applied for Letters of Intimation can be imprisoned for more than one hundred days without being brought to trial. Various questions of law have, from time to time, arisen on the construction of the Statute, but its general import has always been clearly understood.

On the 8th of March 1702 William the Third died. On the 9th of June the Parliament of Scotland met. During the reign of William it had been enacted that, on the demise of the Crown, the Estates should not at once be dissolved, but should have power to deliberate for six months after the death of the Sovereign. They were not to sit longer than six months ; and their power was limited to passing such Acts as were needed for the defence of the Protestant religion, the maintenance of the succession to the Crown, as settled by the Claim of Rights, and the preservation of the peace and safety of the kingdom.¹

When the House met on the 9th of June, the Duke of Hamilton rose, and craved a hearing. The Lord Chancellor requested him to sit down until the Queen's letter had been read ; but he remained standing. He was the premier peer of Scotland. The blood of the Stuarts ran in his veins ; and the honour due to his lofty rank, and the admiration excited by his graceful bearing, awed the House into respectful silence. In a firm voice, and with dignified gestures, he protested against the meeting of Parliament. All Parliaments were, he said, by the fundamental rules of the Constitution, dissolved by the death of the King or Queen, except in so far as was provided for by the Act of Security, the ends of which were the defence of religion, the maintenance of the succession, and the security of the kingdom. "And seeing," he concluded, "that the said ends are fully satisfied

¹ Stat. 1696, cap. 17 : Act for the Security of the Kingdom.

by her Majesty's coming to the throne, whereby the religion and peace of the kingdom are secured, we conceive ourselves not now warranted by the law to meet, sit, or act; and, therefore, do dissent from anything that shall be done or acted." With these words he left the House. Seventy-nine members, peers and commoners, followed him. They went out in the order of their precedence, and, amidst the cheers of an immense crowd, walked in procession to a tavern near the Town Cross, "where they dined together, to knit the public by the ties of private union."¹

Three days after this event, it was stated in Parliament that a meeting of advocates had been held, at which an address had been prepared and signed "concerning the meeting of Parliament, and other public matters." The records of the Faculty of Advocates are silent on the subject; but the charge seems to have been that a written declaration in favour of the seceding members of Parliament had been drawn up, and signed by the Dean of Faculty on behalf of the bar.² An inquiry was instituted. Seventy advocates declared that they had given no authority to the Dean to sign any paper, and twenty refused to answer the questions put to them.³ On the 16th of June the Lord Advocate read to the House a charge which he had prepared against the twenty "refusers." The advocates were called to the bar of the House. With the Dean at their head, they appeared, and craved time to answer the Lord Advocate's accusation. Stewart agreed to this, and said he would furnish the Dean with a copy of the charge and a list of witnesses. A week later the House decided that the advocates, by putting on record their judgment on a matter

¹ Lockhart Papers, i. 45-47; Tindal, i. 556; Dalrymple, *Memoirs*, iii. 190; Hill Burton, *Hist. Scot.* (1689-1748), i. 341.

² The Dean of Faculty at this time was Robert Bennet.—*Minutes of Faculty*, January 1702.

³ There were 145 members of the bar at that time.—*Marchmont Papers*, iii. 241.

“extrinsic to their ordinary administration,” had rendered themselves liable to punishment: a decision which, though perhaps arbitrary, was based on the sound principle that a corporation of lawyers should not concern itself with politics. But the Estates grew tired of the subject. The debates were long, for the accused were ready and able to defend themselves. The whole question was at last remitted to the Privy Council, and nothing further was done.¹

The last Scottish Parliament met on the 6th of May 1703. The Duke of Queensberry was Lord High Commissioner, and there was a large attendance. The names of the members are familiar. An Anstruther, a Bethune, and a Balfour came from Fife. The three members for Argyllshire were Campbells. A Dundas, a Primrose, a Lockhart, and a Dickson represented Midlothian. Graham of Gorthie, Murray of Ochtertyre, Haldane of Gleneagles, and Oliphant of Gask, were the four members for Perthshire. The Lord Advocate is named on the roll as one of the “Lesser Officers of State,” along with the Lord Clerk Register and the Lord Justice-Clerk. In the list of peers is found the name of Stair, whose father had died in November 1695. For some time after the Report of the Glencoe Commission he had been in retirement; but, having obtained a letter of remission under the Great Seal, he was able once more to move in public affairs. He had taken his seat in Parliament in February 1700, and now appeared, as Viscount of Stair, at the last meeting of the Scottish Estates.²

Among the contending factions which were represented in this Parliament three parties could be distinguished; the Court party, consisting of placemen of the common type and some independent members; the Country party, led by

¹ Act. Parl. Scot. xi. 15, 17, 18, 25, 28; Lockhart Papers, i. 47.

² He had been created Earl of Stair on the 8th of April, but his patent was not recorded in the rolls of Parliament until the following year, when he took his place among the Earls; Act. Parl. Scot. xi. 119.

Hamilton; and the Cavaliers, led by the Earl of Home, and called "Mitchell's Club," after the tavern in which they usually met.¹

The Queen's letter was read. The Lord High Commissioner and the Lord Chaneellor addressed the House. Then Hamilton rose, and submitted a bill for recognising Queen Anne's authority, and her right to the imperial crown. It was read a first time without opposition, and the next discussion was fixed for the 15th of May. When that day came the Lord Advocate moved that a clause be added to the bill, to the effect "that it is and shall be high treason, in any of the subjects of this kingdom, to disown, quarrel, or impugn her Majesty's right and title to the Crown of this kingdom, or her exercise of the government thereof, from her actual entry to the same." An angry debate followed this proposal. Hamilton and his party maintained that the Lord Advocate's amendment was an insult to the Queen. It implied, they said, that something had been done by her Majesty which needed an indemnity. The Ministers were endeavouring to shield themselves and their actions by a pretended zeal on behalf of the Crown. They had acted contrary to law in advising her Majesty to call the late Parliament, and were now attempting to "shuffle in this dishonourable clause," in order to save themselves. The debate was long, and the issue was uncertain. The Court party and the Country party were equal in numbers. The balance of power, therefore, lay in the hands of the Cavaliers. When the vote was taken, the Cavaliers supported the Government, and the Lord Advocate's clause was carried by a large majority. The Act then passed.²

¹ Lockhart Papers, i. 58.

² Boyer, *Annals of Queen Anne*, ii. 25, 26; Tindal, i. 596, 597; Lockhart Papers, i. 59; Stat. 1703, cap. 1, Act Asserting and Recognising her Majesty's Authority. "All the ministers voted for the Advocate's clause; as also, all the Presbyterians, excepting fifteen or twenty. A great many likewise of the Church party concurred with the Ministry in this matter, being told by the Commissioner

When the Act which had thus passed was carried to the throne to receive the Royal assent, Hamilton protested that the Advocate's clause applied only to the Queen's exercise of her own authority. The actions of her Ministers, he said, might still be challenged. This threat was, however, forgotten in the excitement of the memorable debates upon the Act of Security. In these stormy discussions Stewart took an active part. As time went on the turmoil of party strife grew worse and worse. The House met, deliberated, and rose amid scenes of wild excitement. Once a thunderstorm burst over the city during a division. Torrents of rain, falling on the leaden roof of the Parliament House, drowned the voices of the clerks who were calling the rolls; and a member shouted that Heaven declared against what was being done. On another occasion, "the House," says Lockhart, "being crowded with a vast number of people, nothing, for near two hours, could be heard but voices of members and others (it being late and candles lighted), requiring 'liberty,' and 'no subsidy.'"¹ Long before the Estates rose, English politicians had become seriously alarmed at the state of affairs in Scotland; and the form which the Act of Security was taking was held to be incompatible with a Union of the Kingdoms.² When the measure passed, the Royal assent was refused. But in the following year the state of feeling in Scotland was such that, when the Act of Security was again passed by the Estates, Ministers dared not advise a second refusal of the Royal assent; and the measure became law.³

It was felt that the only chance of peace lay in a Union. The difficulties in the way were enormous. There were,

that it was the Queen's mind that the actings of her Ministry, in relation to the Parliament, should not be touched."—Boyer, ii. 27.

¹ Lockhart Papers, i. 69.

² Vernon to Shrewsbury, 13th August 1703, Letters, iii. 236.

³ Act for the Security of the Kingdom, Stat. 1704, cap. 3.

indeed, some statesmen in both countries who favoured the project. But most Scotsmen feared and hated England; and most Englishmen despised and hated Scotland. The mutual animosity of the two countries was increased by the failure of the Daricn Expedition, and the execution of Captain Green; but the Union was merely a question of time in the estimation of all moderate men.¹

The Commissioners on Union were appointed in March 1706. There were thirty-one for each nation. The Solicitor-General for Scotland, Sir David Dalrymple, was on the Commission, but the Lord Advocate was not. Stewart's intellect was still as acute as ever; but his health was failing. He had grown enormously fat and heavy. He needed support as he walked along the streets, and found it difficult to rise in his place in Parliament. It was, therefore, quite impossible for him to go to London. Nor was he willing to make any great exertion at this time. He was opposed to the Union; and his opposition, it was now and then suspected, took a more active form than mere theoretical dislike. When the Articles of the Treaty, having been adjusted by the Commissioners, came under the consideration of the Estates, each day saw protests and petitions against Union presented to the House, and division followed on division in rapid succession. The Lord Advocate's name is not found in the division lists. He did not speak against the Union, but he refused to be either coaxed or threatened into supporting it. It was believed that, at last, when the great struggle was drawing to a close, he had lent his pen

¹ At the well-known trial of Captain Green for piracy, the Lord Advocate was in what seems a peculiar position. The Privy Council appointed "Sir James Stewart, her Majesty's Advocate, Sir David Dalrymple and Mr. William Carmichael, her Majesty's Solicitors," and four other counsel, "to be assistants to Mr. Alexander Higgins, Procurator-Fiscal to the Admiral Court." The trial took place in the High Court of Admiralty; and the Procurator-Fiscal appears to have taken the lead, even when the Lord Advocate was present. It was Sir David Dalrymple who addressed the jury on the evidence.

to the cause of the Opposition. The Opposition was then desperate. The Duke of Hamilton convened a meeting at his house, when it was decided that some resolute step must be taken. The Twenty-second Article of the Treaty had been reached. By it the representation of Scotland in the future Parliament of Great Britain was fixed at sixteen peers and forty-five commoners. A document was drawn up, and adopted by Hamilton's friends, in which it was declared that the Estates were not empowered to encroach upon the privileges of the peers, nor to lessen the number of representatives which the people of Scotland had in Parliament. This document, said to have been written by Stewart, is preserved among the Lockhart Papers. It is an able production, not unworthy of the pen which had attacked Lauderdale and written to Carstares. But there is no conclusive evidence that it was composed by the Lord Advocate.

It was intended that, when this protest had been read, the Opposition should leave the House in a body. But the movement came to nothing. On the appointed day Hamilton refused to take the lead, and the carefully-prepared manifesto was not presented. When the Twenty-second Article had been carried the great fight was over.

In the fight one illustrious combatant had fallen. Stair's labours in the cause of Union, from the day on which the Commissioners were appointed until that afternoon in January when he left the Parliament House for the last time, had been incessant. Day after day he had contended against the Opposition with unfailing tact and indomitable courage; but the debate on the Twenty-second Article killed him. He took part in the discussion with even more than his accustomed energy, and, when the division was over, left the House, flushed with triumph, but utterly exhausted. Instead of resting, he sat down and wrote some letters for England; and on the following

morning, the 9th of January 1707, he died suddenly in bed. Had he lived a week longer he would have seen the Act of Union passed.¹

In the first Parliament of Great Britain Lord Advocate Stewart had no seat. He was quite unfit for the exertion of going to Westminster; but the Solicitor-General for Scotland, Sir David Dalrymple, brother of the late Earl of Stair, was member for the Haddington burghs, and soon displayed remarkable talents for debate.

The Union made a change in the position of the Lord Advocate; for it led to the passing of an Act which materially affected the powers and importance of his office. By the Act of Union the Scottish Privy Council was left in existence. But the close of its chequered career was at hand. A bill was brought into Parliament for the purpose of "rendering the union of the kingdoms more complete," the leading feature of which was that there should be, in future, only one Privy Council for Great Britain. The bill was strenuously resisted. Thoroughgoing Whigs, men who had supported the Revolution and the Union, declared that if the Privy Council of Scotland was abolished they would be at the mercy of the enemies of both the Revolution and the Union.² Two arguments were chiefly used against the bill, one in private and one in public. In private, Ministers were told that, if the Privy Council was maintained, the elections in Scotland could be so managed that supporters of Government would always be sent to Westminster. In public, it was proclaimed that the distance between London and Edinburgh was so great that it would be impossible to govern Scotland by means of a Council sitting in St. James's.³ Most fortunately for Scotland, neither of these arguments prevailed; and, on the 13th of February 1708,

¹ Burnet, *History of His Own Times*, iv. 173; Defoe, *History of the Union*, 207 (1st ed. 1709.)

² Vernon's *Letters*, iii. 289.

³ Burnet, iv. 222.

the bill received the Royal assent.¹ The system of having a special Ministry for Scotland was at an end.

Though the abolition of the Privy Council was unpopular in Scotland, there was nothing in its history of which Scotland could be proud. Throughout its long career, from the earliest times down to the days of Lord Advocate Stewart, the Council had always been the chosen instrument of tyranny or intolerance. Its infamy had reached a climax during the gloomy period between the Restoration and the Revolution. Spies had then been employed in hundreds to go about, Bible in hand, feigning sympathy with the nonconformists, while endeavouring to gain information for the use of Government; and, on information so obtained, men of blameless life had been tried, condemned, and executed within the space of twenty-four hours. It was said that when the victims appealed to the Council for a short respite, the answer had been, "They shall have no time to prepare for heaven; hell is too good for them."² Before the Revolution, shiploads of men and women had been exiled to distant lands for the offence of attending a prayer-meeting. After the Revolution, Neville Payne had been savagely tortured, and Thomas Aikenhead had been allowed to die under an unjust verdict. All these deeds of shame had been done at the bidding of the Scottish Privy Council. There was no division in the House of Lords on the third reading of the bill for destroying this dangerous engine of oppression; but a solemn protest against the change was entered by a number of Scottish peers.³

One effect of the abolition of the Privy Council of Scotland was to increase the importance of the Lord

¹ 6 Anne, cap. 40; Parl. Hist. vi. 613; Commons' Journals, 13th Feb. 1707.

² The Scottish Inquisition, or a Short Account of the Proceedings of the Scottish Privy Council, etc., 1689.

³ Parl. Hist. vi. 613; Protests of the Lords, 1624-1874, i. 184 (Thorold Rogers, Clarendon Press, 1875).

Advocate's office. So long as there was a distinct Ministry for Scotland, the Lord Advocate shared with six or seven other Ministers the responsibilities of government, in addition to performing the legal duties peculiar to his office. But when the Privy Council was abolished, a much larger share of the purely political business of Scotland was intrusted to him. We shall afterwards see how, from time to time, "Scottish Managers," "Secretaries of State for Scotland," and other officials, were either appointed by the Crown, or permitted, in consequence of some understanding with the British Cabinet, to take the control of Scottish affairs. But from the time at which the Privy Council of Scotland was abolished, the Lord Advocate's duties have gradually become more onerous, and, at the same time, less clearly defined.

A few days after the Act abolishing the Scottish Privy Council passed, rumours of an intended Jacobite invasion reached England.¹ The alarm soon spread to Scotland; and all those who were suspected of sympathy with the Pretender were closely watched. The Jacobite expedition sailed; but in four weeks it had returned to France, and the danger was at an end. Some gentlemen of Stirlingshire, however, had impetuously taken arms and prepared to make war against the Government. They were arrested; and, on the 15th of November 1708, the High Court of Justiciary met to try them on a charge of treason. The evidence for the Crown was wholly insufficient; and the verdict was one of not proven. Only four witnesses had been examined. This was owing to the way in which the Lord Advocate had conducted the prosecution. The Court were of opinion that a list of all the witnesses should be furnished to the accused fifteen days before the trial. Stewart did not think this was necessary. The names of the principal witnesses were

¹ Burnet, *History of His Own Times*, iv. 224.

not given to the prisoners ; and the judges would not allow them to be examined. Instead of asking for delay, the Lord Advocate went on with the case, which could not be proved by those witnesses whose names had been furnished to the accused, and the result was an acquittal. "Severe expostulations," says Burnet, "passed between the Queen's Advocate and the Court; they complained of one another to the Queen, and both sides justified their complaints in print."¹

This State trial had revealed the fact that the Treason Law of Scotland was vague and unsettled ; and the Government resolved to bring about a different state of things. The course taken was a bold one. The whole Treason Law of Scotland was to be swept out of existence, and that of England put in its place. The English judges were directed to prepare a bill for the purpose.² In due time the measure was introduced, under the title of a "Bill for Improving the Union of the two Kingdoms." It was bitterly opposed, and did not become law without long and stormy debates. The Statute swept away the whole fabric of the Treason Law of Scotland, and put in its place another and better structure which, based on an Act of Edward the Third, had been slowly rising in England since the middle of the fourteenth century. No part of the new law was more vehemently opposed than that which changed the mode of trial. On that point the law was altered to its present state. The procedure now is to try cases of treason before a Commission of Oyer and Terminer issued under the Seal of Great Britain. Three of the judges of the Court of Justiciary

¹ Books of Adjournal, 15th-22d Nov. 1708. The accused were Stirling of Keir, Seton of Touch, Stirling of Carden, Stirling of Kippendavie, and Edmonston of Newton. There is nothing in the record of Court to show that any question had arisen with regard to admitting or refusing witnesses. For that fact Burnet is the only authority ; History, iv. 253. The case will be found in the Collection of State Trials, xiv. 1395.

² Lords' Journals, 1st March 1709.

must be members of any such Commission, one of whom must be present at the trial. Under the old form of process the Lord Advocate prosecuted for treason, either at his own discretion, or in virtue of a warrant from the Privy Council. This is no longer the case ; and prosecutions for treason are not now at the discretion of the Lord Advocate. The English system of a Grand Jury was introduced in 1709 ; and the proceedings in Court must now be regulated by English forms. The Lord Advocate has, however, the right of applying to the Lord Chancellor for a writ of certiorari, under which he may remove a prosecution from before a Commission of Oyer and Terminer to the High Court of Justiciary ; but when a prosecution has been so removed, the High Court is bound to try the case in the same manner as the Court of Queen's Bench tries cases brought before it by writ of certiorari.

The Act removed two scandalous abuses, trial in absence and examination by torture. It will be remembered how, in 1669, an Act was passed by the Scottish Parliament, which ratified the sentence pronounced in absence on some of those who had been concerned in the Pentland Rising.¹ Although trial in absence was a notorious grievance, not only contrary to the law of Scotland, but repugnant to all sound principles of criminal jurisprudence, it was not mentioned in the Claim of Rights. Nor did the public prosecutor hesitate to use this form of procedure during the reign of William the Third. Simon Fraser of Lovat was sentenced to death when he was among the Highland hills ; but this was the only case in which the Crown counsel of that time indicted any one under the Act of Charles the Second. It was, nevertheless, in the power of the Lord Advocate to prosecute in absence until the passing of the Act of Queen Anne, which, by abolishing the Scottish law

¹ *Supra*, pp. 189, 191.

of treason, virtually repealed the Statute of 1669. Down to the date of the Union torture had been a formidable weapon in the hands of the Lord Advocate; but, by the new Treason Act, it was declared that, after the 1st of July 1709, no person should suffer torture in Scotland.¹

During the winter of 1709 Stewart was engaged in the duties of his office. In May of that year he was requested to resign. "You have heard," his nephew writes to Wodrow, "before this time, that the Advocate is put off without knowing anything of it, before he has a pension of seven hundred pounds. He is relieved of a great trouble, but is a little offended at the manner of his removal." Wodrow answers: "I was much vexed when I heard of the Advocate's losing his place. I hoped he should have died in that post. I am persuaded this change is a great loss to this Church, and I fear we shall feel it sensibly."² Stewart, it may be surmised, lost his office, either because the Ministers were dissatisfied with his conduct at the trials of the previous year, or because he was not in Parliament. His successor was Sir David Dalrymple, of New Hailes, brother of the first Earl of Stair.

Three years later Stewart was again Lord Advocate; but, although he remained in office till his death, the circumstances under which he was re-appointed form part of Dalrymple's career, and will be narrated in the next chapter.

In 1713 Stewart's health was very feeble. "His preservation to this time," says Wodrow, "for the [last] six years and a half, has been nixt to a miracle; a man of his bulk, bussiness, and infirmity, for soe long a time to be confined to

¹ 7 Anne, cap. 21; Burnet, *History of His Own Times*, iv. 252-258; *Parl. Hist.* vi. 794-799; Hume, *Crim. Com.* i. 536, etc.

² Robert Stewart to Wodrow, 2d June 1709; Wodrow to Robert Stewart, 17th June 1709. Robert Stewart, son of Sir Thomas Stewart of Coltness, was Professor of Philosophy in the University of Edinburgh; Wodrow *Correspondence* (Printed), i. 17. The Lord Advocate's nephew was mistaken in saying he was forced to resign without a pension. Seven hundred a year was promised to him, although it was not paid for some time; *Cal. Treasury Papers*, 1708-1714, 143.

a chair, and never able to move, except when lifted by his servants ; yet still clear in his head and judgement, and as fitt for bussiness as ever in his life time." For some weeks he was confined to bed ; and on the morning of the 1st of May 1713 he became suddenly worse. His last moments are thus described by Wodrow. " His son, Sir James, standing by, said, ' My Lord, will you dye befor you bless me ? ' When he recovered a little out of his fainting, he said, ' Noe, James, I will not dye till I blesse you all.' And,indee d, like old Jacob, I may say he dyed in the act of blessing of his family ; and, like his Master and Lord, his soul was taken away—he was parted from his relations when blessing them ! Accordingly, he called for his eldest son, Sir James, and his Lady, and blessed them ; and among other things, in his discourse to him, he said, ' Noe pageantry, James ! '—meaning at his funeralls." His nephew, Robert Stewart, entered the room. " When speaking to him," continues Wodrow, " Sir David Stewart, his nephew, came in ; and he said, ' The Lord blesse you, Sir David, and—' and there he stopped, and putt up his hands, and shutt his own eyes, and dyed in half-a-minute, without one throw or shrink."¹

¹ *Analecta*, ii. 207. His death was celebrated in the elegies which, at that time, were composed at the death of any distinguished person. The broadsheets hawked about the streets were, as usual, numerous. One piece of doggerel runs thus :—

" Let Scotland Mourn ; the State and Church have lost
A Pillar, whereof they of late could Boast.
None such in Europe, nay, for Ages past,
They cannot show a Head so Sound and Fast :
Profound his Wisdom ! Next to Solomon,
His Equal none can Condescend upon.
Most intreat and Nice Affairs of State,
Were soon Resolved by his Unerring Pate.

No Weighty Matters of the Church or State,
Nor Case of Law, in any Grand Debate,
Without his Counsel, Vote, or Approbation,
Has ever been transacted in the Nation."

" A Second Elegy upon the most Lamentable Death of the Right Honourable Sir James Stewart of Goodtrees, Her Majesty's Advocat, who Departed this Life, May 1st, 1713, in the 78 Year of his Age." Pamphlets, Advocates' Library, vol. 10, No. 95.

Thus died Sir James Stewart. Fifteen hundred letters announcing his death were issued; and the funeral was attended by a vast concourse of people. He was buried in Greyfriars' Churchyard. All the peers and gentlemen then in Edinburgh, the members of the General Assembly, which was sitting, and the Corporation of the city, were present. The procession was so long that those who led it reached the grave before the coffin left the Lord Advocate's house.¹

In person, Stewart is said to have been a big handsome man. His massive figure and dark face are to be seen in a portrait which hangs in the Signet Library at Edinburgh. In conversation he appears to have been somewhat rough. According to Wodrow, "Many a 'beast,' and 'fool,' and 'ignoramus,' he would have called these he reasoned with." But his temper was good, and he was an entertaining companion. His religion was of that severe kind which had been produced in many Scotsmen by long years of persecution. One of his family has left on record an account of a Sunday at the Lord Advocate's house, which narrates a formidable day's work. The private chaplain read prayers at nine in the morning. At ten the whole family walked to church. At half-past twelve they were home again; and at one the chaplain read prayers. After a light lunch, they returned to church at two. At four the chaplain instructed the children and servants. At five they dined. At eight the Lord Advocate himself read prayers; and this ended the labours of the day.

¹ The Scots Courant, 4th May 1713; Coltness Collections, 368; Scots Magazine (N. S.), i. 13. Lord Advocate Stewart's town house was one which he inherited from his father, the Provost. It was to the north of the Church of St. Giles, and was to be seen till the year 1882, when it was pulled down. The "close," or entrance, which led to it is still called "Advocate's Close," a name which it received when Lord Advocate Stewart rebuilt it after the Revolution. For a number of years before his death Sir James Stewart was in possession of the estate of Goodtrees, in Midlothian, now known as Moredun. In 1712 he bought the family property of Coltness from his nephew, Sir David Stewart.

Lord Advocate Stewart had witnessed, in the course of his long life, three memorable events, the Restoration, the Revolution, and the Union. During four reigns he had taken an active part in great public transactions. His conduct, when James was on the throne, laid him open to the accusation of being a trimmer. But the sagacious Carstares, who was thoroughly acquainted with the most secret political transactions of the time, evidently had good reason to know that "the honest old Advocate," whose death he lamented, had remained true to the principles for which he had suffered under the merciless government of Lauderdale.

CHAPTER X.

DALRYMPLE AND DUNDAS.

SIR DAVID DALRYMPLE, who became Lord Advocate when Stewart was dismissed in 1709, was the fifth and youngest son of Viscount Stair, the celebrated President of the Court of Session.

In his youth Dalrymple left Scotland with his illustrious father, and was a student of law at Utrecht when Stewart and the other political exiles were assembled there. In the year of the Revolution he was called to the bar; and, aided by the influence of his brother the Lord Advocate, he soon achieved success. In 1697 he was elected for Culross, a burgh which he represented in the Scottish Parliament until the Union. In 1700 he was made a baronet. He was one of the Commissioners for the Union, and is said to have written the ablest of the many pamphlets which were published at that time. After the Union, he sat in the first Parliament of Great Britain as member for the Haddington Burghs; and for this constituency he was re-elected on his appointment as Lord Advocate in May 1709.

The position of Lord Advocate was now one of extreme difficulty. At the time of the Union there were two Secretaries of State for England. When the Scottish Privy Council was abolished, the office of Scottish Secretary, or Lord Secretary, as he was styled on the rolls of Parliament, ceased to exist. For some time it was uncertain what

arrangement would be made for the management of Scottish business. At first it was intended that the two Secretaries of State should add the affairs of Scotland to the business under their charge; but ultimately a third Secretary was appointed, who, it was understood, would chiefly devote himself to Scotland. The third Secretary came in a few years to be known as the Secretary of State for Scotland. He had an office of his own in London; and a despatch-box, known to officials as the Black Box, passed between him and the authorities in Edinburgh, containing all documents connected with the management of Scottish affairs. The Lord Advocate was, however, an Officer of State, and the Officers of State were, in Scotland, the constitutional advisers of the Crown on all political matters. "From remote antiquity," it has been said, "the Advocate was, *virtute officii*, a confidential and responsible adviser of the Sovereign. In that respect the office was entirely different from that of the Attorney-General in England, who always has been only a law officer of the Crown, and whose advice, before it can be followed by the King (and for which no responsibility ever attaches to the Attorney-General himself), must be adopted and acted upon by one of his Majesty's confidential servants, who himself is responsible to the Sovereign: whereas the Lord Advocate was not merely the law officer of the Crown, but the King's adviser and counsellor in all matters in which the advice of the confidential servants of the Crown was required to be given: but more especially in those acts of the Government more immediately connected with his own department; and in this respect he seems to have stood precisely in the same situation as the Lord Treasurer and Comptroller."¹ As the Lord Advocate had never been,

¹ Lord Meadowbank in *Dunglas v. The Lord Advocate*.—Shaw's Court of Session Reports, xv. 348. A history of the office of Attorney-General is given in the Memoirs of Chief-Justice Wilmot, pp. 322-340.

while Scotland had her own Parliament and Government, merely a legal officer, but had shared with the Secretary and the other Ministers the responsibilities of the Cabinet, it was natural that he should, after the Union, continue to take a part in the general business of Government. And accordingly, during the years which immediately followed the Union, Scottish political business was managed by the third Secretary of State and the Lord Advocate.

The legal portion of the Lord Advocate's duties was, at this time, a heavy charge. His opinion was called for in numerous cases of every description. Important questions of international law regarding the revenue, customs, the excise, banking, and other subjects, were frequently before the English Government; and the practice was to take the joint opinion of the Lord Advocate and Attorney-General.¹ In advising the Government considerations of policy, as well as law, had to be taken into account. There was, for instance, a great deal of smuggling in Scotland. Yet the Lord Advocate, in his conduct as public prosecutor, had to be guided by the position of public affairs, and to remember that it was really of more importance to the welfare of the country that the people should be satisfied than that smugglers should be punished. Thus, soon after his appointment, Dalrymple writes to the Lord High Treasurer, stating that if certain smugglers are prosecuted there will be general complaints, and the trade of the country will be injured. He suggests that leniency will beget confidence in the Union. The murmurs of the people, he says, are not always to be regarded; nor are they always to be despised. There will be no small difficulty in bringing the trials to a successful issue; and if the juries begin to acquit, the troubles of the Crown will be increased.²

Dalrymple was not only burdened with official troubles,

¹ MSS. Adv. Library, 23. 1. 3.

² Cal. Treasury Papers, 1708-1714, 125.

he had also to contend against personal opposition. Church feeling ran high. The Established Church hated the Episcopalians, and the Episcopalians hated and feared the Established Church. Lord Advocate Stewart had always been a sturdy Presbyterian. Of him Lockhart of Carnwath afterwards said, "This I may safely aver as a truth, that from Land's End to Orkney, a greater enemy to the Monarchy, the sacred order of Episcopacy, and the Church of England, could not have been found, had all their calve-head feasts, Kitcatt Clubs, and Covenanting Conventicles been searched into for that very purpose."¹ The Presbyterian Wodrow, on the other hand, bewailed the dismissal of Stewart. "I am persuaded," he said, "this change is a great loss to this Church, and I fear we shall feel it sensibly."² The Episcopalians, crushed at the downfall of the Stuarts, were beginning to lift their heads again. At the Revolution the form of public worship was almost the same in both Churches. Not even in the Cathedrals did the Episcopalians use a liturgy, although their service was more elaborate than that of the Presbyterians, who carried their love of simplicity so far as to sneer at the use of the Lord's Prayer. Both the Episcopalians and the Presbyterians received the Sacrament of the Supper sitting; and neither used the sign of the Cross in baptism. But now things were changing. There were in Scotland about one hundred Episcopalian clergymen, besides a number of preachers who conducted worship in meeting-houses. Of these some prayed for the Pretender, some refused to pray for the Queen, and some prayed for "our Sovereign," meaning the Pretender.³ The use of the Liturgy was coming into fashion. Many gentlefolks, it was noticed, buried their dead according to the ritual of the

¹ Lockhart Papers, i. 552.

² Wodrow Correspondence (Printed), i. 19.

³ The Case of Mr. Greenshields, as it was printed in London, with Remarks upon the same. (Edin. 1710.) Pamphlets, Advocates' Library, 269.

Church of England.¹ "Though we complain," writes a Churchman at this time, "of these things to magistrates, who by office should take course with these innovations, we are not heard, and we expect no service to this Church from this new Lord Advocate. He has scored out of the Portuous Roll all intruders, preachers in meeting-houses, and others, so that he can get nothing done against them; they are strengthened and encouraged by him and others to commit these disorders, etc., and our hearts are discouraged, and our hands are weakened. The prelatie party is much encouraged, and they turn very insolent."²

Most of the Episcopalians were disloyal; most of the Presbyterians were intolerant; and the Lord Advocate had to face, as best he could, this mass of disloyalty and intolerance. During the first week he was in office, an Edinburgh newspaper stated that the Chapel-Royal at Holyrood was to be repaired and set in order for the celebration of the English service. The Established Church was alarmed. Dalrymple was blamed, and was so afraid that he would lose all influence with the Presbyterians that he wrote to London, and obtained leave from Queen Anne to contradict the rumour.

This matter was soon forgotten. But his troubles were increased by the well-known case of the curate Greenshields. Greenshields had taken orders in the Episcopal Church after the Revolution, and had worked as a clergyman in Ireland till April 1709, when he came to Edinburgh, and took the oaths required by law. He began to use the English Liturgy in public worship. The Presbyterians objected, and complaints were addressed to the Court in London. The Queen wrote to the Lord Advocate, and authorised him to inform Greenshields that he must not use the English Church service, as

¹ Wodrow Correspondence (Printed), i. 79.

² Maxwell to Wodrow, 7 Nov. 1709; Wodrow Corresp. (Printed), i. 79, 80.

that was an eneroachment on the privileges of the Established Church of Scotland.¹ The Presbytery of Edinburgh also ordered Greenshields to give up his serviees. He refused, and the magistrates of the eity put him in prison. He appealed to the Court of Session, and maintained that none of the laws of Scotland forbade him to use the English service. The judges sympathised with him, but held that if a Mahometan mufti was to teach the Koran in Edinburgh, it would be no exeuse for him to say that there was no law in Scotland against the Koran. They therefore refused to release him unless he promised to submit to the orders of the Presbytery and the magistrates. He appealed to the House of Lords. This raised the great Constitutional question of whether any appeal lay from the Court of Session to the House of Lords. Two years passed before it was decided; but in the end the Episeopalians triumphed. It was held that there was an appeal, and the House of Lords gave judgment in favour of Greenshields.²

From the end of Charles the Second's reign until 1708 no Circuit Courts were held in Scotland.³ By the eustom of early times there had been two Circuits yearly, one in spring and one in autumn. But this custom had been neglected for many years previous to 1587. In that year a Statute was passed which ordained that "the ancient and loveable order" should be revived, and that Circuits should be held twiee a year, "once on the grass and once on the corn." The attendanee on the Judges of sheriffs, warders,

¹ On the 14th of October 1709 Wodrow dined with Sir John Maxwell of Pollok, one of the Judges of the Supreme Court. The Lord Advocate was there. He said to Wodrow that he had not thought it for the interest of the Church to write to London about Greenshields merely on account of his using the English Liturgy. He had, therefore, himself examined the curate, who acknowledged that he was ordained in 1693 in Ireland by a nonjuror Bishop. "On that chiefly" he wrote. Dalrymple read to Wodrow the letter which he had received from the Queen, directing him to stop Greenshields. *Analecta*, i. 211.

² *Fountainhall, Decisions*, ii. 523, 549; *Hill Burton, Hist. Scot.* (1689-1748) ii. 35-38.

³ *Hume, Commentaries*, ii. 21.

and freeholders was made compulsory; and it was provided that certain persons in each shire should be Commissioners for "taking up dittay," that is, procuring information of crimes.¹ In the course of a few years a variety of causes led to the abandonment of this mode of "taking up dittay," and the previous system was again adopted. The Sheriffs procured the information, and the Justice-Clerk prepared the indictments.² Circuits were held once or twice a year from 1587 until the close of Charles the Second's reign. But from that time until after the Union there were none. The Act for rendering the Union more complete provided that Circuits should be held in April or May, and in October.³ At these Circuits the freeholders had to attend; and this was considered a troublesome and useless ceremony. The mode of making up the "Portuous Roll," or list of cases, was unsatisfactory. The practice was to appoint thirty "Portuous Clerks," who went to the different counties and obtained materials for the Portuous Roll. The Sheriff summoned a number of persons to meet the Portuous Clerk at the county town, and give information, on oath, of the crimes which had been committed. The information having been given to the Portuous Clerk, he handed all the papers to the Clerk of Justiciary, by whom they were sent to Crown Counsel, in order that indictments might be prepared. This system did not succeed. The Portuous Clerks were unable to obtain proper information. They were usually strangers in the districts to which they were sent. They had not time to make the necessary inquiries. Nor were they men of a position which commanded respect or secured attention.⁴

There was a strong feeling in Scotland in favour of some change in this department of the criminal law. In November 1708 Lord Justice-Clerk Cockburn, who used to say that the

¹ Stat. 1587, cap. 82. *Supra*, p. 53.

² Hume, Commentaries, ii. 23, 24.

³ 6 Anne, cap. 40, sect. 4.

⁴ Hume, Commentaries, ii. 25.

way in which the Portuous Roll was made up “savoured too much of the Inquisition,” requested Lord Advocate Stewart to prepare a memorial on the Circuits which might form the basis of a bill. Stewart did so; and at a meeting between him and the Lords of Justiciary the subject was discussed. The Lord Advocate’s scheme was approved, and sent up to Government.¹ But nothing was done till January 1710, when a petition was presented to the House of Commons by the Justices of the Peace, barons, and freeholders of Kincardineshire. It set forth that by the old laws and constitution of Scotland, when the Kings went their Circuits in person, the freeholders attended them, to protect them, and to suppress tumults. “These Circuit Courts,” the petition said, “and the method of exhibiting crimes, has been long discontinued, and not in use for many years before the late Union; and now, since the Lords of the Circuits have revived those customs, and expect the same attendance, as formerly their Kings had, and fine and imprison for non-attendance, it is a great hardship and grievance upon the petitioners and her Majesty’s subjects of North Britain.” They therefore prayed that a bill might be brought in to free them from “that slavish and unnecessary attendance upon the Circuits.” The prayer of this petition was granted by the House, with special orders that the proposed measure should apply to the whole of Scotland.² The bill, introduced by Sir David Ramsay, the member for Kincardineshire, having been read a second time without a division, was referred to a Select Committee, which included “all the Gentlemen that serve for North Britain, and all of the long Robe.”³ It passed the Commons without difficulty, and was sent to the House of Lords.

¹ Hist. MSS. Commission, Third Report, Append. 371.

² Commons’ Journals, 18th January 17⁹⁰.

³ Commons’ Journals, 13th February 17⁹⁰. “And they are to meet this Afternoon, at Five a clock, in the Speaker’s Chamber.”

The Upper House was always prompt in the despatch of business. The peers were busy with the trial of Sacheverell; but the Scottish Justiciary Bill was carefully considered, carried through all its stages, and passed in ten days.¹

The presence of noblemen, barons, and freeholders at Circuit Courts was declared to be unnecessary. The sheriff of the county and the magistrates of the town where the Court was held were alone required to attend. The system of making up the Portuous Roll was changed, and a new scheme took its place. It was now the duty of the justices of the peace, sheriffs, and magistrates to meet and receive information regarding criminal cases for trial at the Circuits. They then prepared Informations, giving the names of the accused, the details of the alleged crimes, and the names of the witnesses, with their evidence. These were sent to the Lord Justice-Clerk at least forty days before the date of the Circuit. The Justice-Clerk handed them to the Lord Advocate and his Deputes, who prepared the necessary indictments. The Act, which came into force on the 1st of May 1710, regulated the preparations for the Circuit Courts until the year 1828.²

This measure was popular and useful. But there was a widespread belief, not only among the opponents of the Union, but among all classes of the people, that the Government neglected Scottish business. Lockhart expressed the opinion of many Scotsmen when he said that the House of Commons might once have been a wise and august assembly, but was now a disorderly mob of men, who only attended in order to shout like Bedlamites when a party job was being done. Not only was Scottish legislation neglected, but officials in Scotland had reason to complain of the way in which mere matters of routine were mismanaged. The lawyers of Scotland had profited by the Union. Many

¹ Lords' Journals, 13th to 22d March 1710.

² 8 Anne, cap. 16.

offices held by humbler persons had been abolished. The King's Laundress, who, till the Union, had received fifty pounds a year for doing nothing, was deprived of her salary. The King's Baker, the King's Hatter, the King's Shoemaker and a host of others who had enjoyed, it is true, no direct pay, but who profited indirectly by the monopoly of using these titles, lost their places. But the lawyers were better off than before. The Lord President of the Court of Session received eight hundred pounds a year, instead of three hundred and fifty. The Justice-Clerk received four hundred instead of two hundred. Each of the two Solicitors-General were paid two hundred a year instead of fifty; and, whereas before the Union Lord Advocate Stewart had only five hundred and fifty a year, Sir David Dalrymple now received a salary of one thousand pounds. But the Treasury was so careless that Scottish officials found great difficulty in obtaining payment of sums to which they were entitled. In May 1710 Lord President Dalrymple, Lord Justice-Clerk Cockburn, and Sir James Stewart, had to press for payment of salaries which were owing to them before the Union.¹ There was no system. It was never certain that any question affecting Scotland, which was brought under the notice of Government, would receive attention. The correspondence of the time is full of complaints of this neglect. In August 1710, however, an attempt was made to arrange the business of the Treasury Board on a regular system, and Monday was set apart for Scottish and Irish business. The other working days of the week were given to England.²

The ministerial crisis which turned out the Whigs, and brought in the Tory Government of Harley and St. John, left Dalrymple in his office of Lord Advocate. But it was

¹ Cal. Treasury Papers, 1708-1714, 180.

² Treasury Minute, 12th August 1710.

only for a short time that he retained his place; and the circumstances which led to his retirement form a curious chapter in the history of the Scottish bar.

Among the possessions of the Faculty of Advocates was a collection of coins and medals. In the summer of 1711 the Jacobite Duchess of Gordon offered to present the Faculty with one of the Jacobite medals which were common at that time. It was a silver piece, worth about half-a-crown, bearing on one side the Pretender's head, and on the other a map of the British Islands, with the significant motto "Reddite."

On the 30th of June an ordinary meeting of the bar was held to examine a candidate for admission to the profession. It is doubtful how many advocates were present. According to one account there were exactly seventy-five.¹ According to another there were only fourteen or sixteen.² The question of the medal was raised; but the records of the Faculty are silent on the subject. The only allusion to the collection of coins is that a committee, appointed to audit the treasurer's accounts, and to suggest means for improving the Library, is directed to report "what course should be taken in relation to the custody of the medals."³ But from other sources we know something of what took place. Either a servant in whose hands the medal had been placed, or the Dean of Faculty, Robert Bennet, presented the medal on behalf of the Duchess of Gordon. It was proposed to place it in the "Repository of Rarities." This was opposed on the ground that it would be an insult to the Government. One member said, "Oliver Cromwell's medal, who deserved to be hanged, and the arms of the Commonwealth of England, were received, and why not

¹ Boyer, x. 204.

² London Post-Boy, 7th Aug. 1711, quoted in the Scots Courant of 13th Aug. 1711.

³ Minutes of Faculty, 30th June 1711.

this ? ” Duncan Forbes, then a junior, but afterwards Lord Advocate and President of the Court, answered, “ It will be time enough to receive the medal when the Pretender is hanged.” Many of those present agreed with Forbes ; but James Dundas, younger of Arniston, rose and spoke in favour of receiving the medal. “ Medals,” he is reported to have said, “ are the documents of history, to which all historians refer ; and, therefore, though I should give King William’s stamp with the devil at his right ear, I see not how it could be refused, seeing an hundred years hence it would prove that such a coin had been in England. But, Dean of Faculty, what needs further speeches ? None oppose the receiving the medal, but *a few pitiful scoundrel vermin and mushrooms, not worthy our notice*. Let us, therefore, proceed to name some of our number to return our hearty thanks to the Duchess of Gordon.” Soon after Dundas had spoken the meeting came to an end. It is not known whether any vote was taken ; but there can be no doubt that Dundas waited upon the Duchess of Gordon, and thanked her, in the name of the Faculty, for the medal.

Vague rumours circulated in Edinburgh that a medal of the Pretender had been received, with special honour, by the bar of Scotland, and that, at a supper given by a young advocate who had just been called, the health of “ King James and the Duchess of Gordon ” had been drunk with great enthusiasm. The Jacobites in Scotland wrote to their friends ; and in London boasts were heard “ that it was done in the face of the world, by the Oracles of the Scotch nation, men learned in the Law.”¹ The Lord Advocate informed the Government of what was said to have taken place, and received instructions to investigate the matter. The advocates were alarmed. At a special meeting of Faculty, held on the 17th of July, they rejected the medal,

¹ Boyer, x. 208.

and appointed a committee to frame a declaration expressing their affection to the Queen, their loyalty to the Protestant Succession, and their hatred of the Pretender and his friends. The medal was, at the same time, handed to the Lord Advocate. On the following day a crowded meeting of the Faculty received the report of this Committee, and passed a resolution, declaring that they had never received the medal, and protesting their devotion to the existing Government. A copy of this confession of its political faith was given by the bar to the Lord Advocate, who sent it to the Secretaries of State in London.¹

While these events were taking place the Edinburgh press maintained a discreet silence. But in London the matter was noticed. The Flying Post published an account of the meeting of Faculty at which the question of receiving the medal was first discussed. The Dean of Faculty printed, in the Edinburgh Gazette, an attack on the Flying Post for publishing false news, and threatened to prosecute the editor. The London Post-Boy defended the Faculty; and it seemed as if a newspaper war would be carried on for some time. But the Flying Post, in answer to the Dean's attack, acknowledged the loyalty of the Scottish bar as a whole, while maintaining the general accuracy of its own report of what had occurred on the 30th of June.² The Dean then gave up the idea of prosecuting the Flying Post.

The Government was satisfied with the conduct of the Faculty in rejecting the medal; and the whole affair would soon have been forgotten, had not a fresh step been taken by Dundas and the ultra-Tory party. A pamphlet was written and sent to a printer, entitled "The Faculty of

¹ Minutes of Faculty, 17th July 1711.

² Scots Courant, 1st Aug. 1711. The other publications were, it seems, in the Flying Post, 2d Aug., Edinburgh Gazette, 8th Aug., and London Post-Boy, 7th Aug. 1711; but I have not had an opportunity of seeing these newspapers.

Advocates' Loyalty, in a letter to the Queen's Most Excellent Majesty, by one of the Dean of Faculty's Council." It was intended to vindicate the conduct of those who had been in favour of receiving the medal. The printer took a copy of it privately to the Lord Provost of Edinburgh, who, instead of forwarding it to the Lord Advocate, laid it before Sir James Stewart. Stewart at once wrote to the Government in London; and it was decided to have a further investigation into the whole affair of the medal.

This investigation was not, however, intrusted to Dalrymple, who, on the 26th of September, received a letter from one of the Secretaries of State informing him that his services as Lord Advocate were no longer required.¹ He answered this letter in the following terms:—"My Lord, I have the honour of your Lordship's of the 18th, with the intimation of her Majesty's pleasure to lay me aside. I should not regret what has been done to me if I were not told from trusty hands that my conduct about the business of the medal or Mr. Dundas' pamphlet had produced this mark of displeasure. That is indeed hard. . . . I was brought into the office of Advocate partly to reward the services I had the honour to be concerned in. I have made journeys and undertaken fatigues when I scarce had life to crawl; and I ask no other reward than to be removed without a stain. It must be with a stain if the world thinks I have failed, either for want of skill, which in a man of profession and a good many years' experience is not creditable, or for want of zeal to the Queen's service, which would mortify me exceedingly. . . . I wish I knew the particular charge against me. I flatter myself I could remove it.

¹ "Some say that the Earl of Oxford and Court is displeased with Sir David Dalrymple his carriage in the affair of the meddail of the advocats. . . . I knou there are ouing to him severall years' arrears of his sallary. Some say this is brought about by Mr. Carstairs' influence, who is at Court and very bigg with the Earl of Oxford." Wodrow, *Analecta*, i. 352.

This I do, not out of any concern for being removed, but because I should be sorry the Queen had an ill impression of me." In a postscript he adds, "I have this famous medal, and shall be glad to receive directions to whom I am to give it up."¹

In the first week of October Sir James Stewart was again Lord Advocate. On receiving his commission he writes: "With her Majesty's commission for me to be her Majesty's Advocate in Scotland, I am honoured with one from your Lordship with the copies of several letters, all relating to that foolish medal and still more foolish apology for our Advocate's loyalty, whereupon your Lordship desires that I, being upon the spot, should examine the circumstances of the affair, and report upon the whole my opinion whether there be sufficient ground for prosecution, particularly what evidence is against the Duchess of Gordon and the author of the printed paper. My Lord, when this matter was recent and entire it might have been more easily noticed. But your Lordship sees what hath since happened in it, and what disguises and excuses have been offered, and withal, in this vacation-time, most of those concerned are gone to the country. But since your Lordship has laid it upon me, I shall inquire into it as far as I can, both to find out the matter of fact, and what may be expected of it."² A prosecution was raised against James Dundas. On the 3d of March 1712 he was brought to the bar of the Court of Justiciary on a charge of sedition. Sir James Stewart, as Lord Advocate, produced an order, signed by Lord Dartmouth, one of the Secretaries of State, directing him to prosecute. But, after the preliminary stages of the case had been completed, the case was abandoned.³

¹ Dalrymple to —, 26th September 1711, Scot. MSS. Record Office.

² Sir James Stewart to —, 2d October 1711, Scot. MSS. Record Office.

³ Boyer, x. 212; Scots Courant, $\frac{1}{3}$ October 1711; A Speech for Mr. D—sse Younger of Arniston, Pamphlets, Advocates' Library, $\frac{2}{233}$; State Trials, xv. 715.

The secret wish of the Scottish Tories was to dissolve the Union. The Scottish Whigs had been the staunchest supporters of the Union. Therefore it was the interest of the Tories to make the Union unpopular with the Whigs. The policy adopted for this purpose was to irritate and alarm the Presbyterians by measures which, it was hoped, would lead them to believe that the maintenance of the Union would be the destruction of Presbytery. The appointment of Stewart as Lord Advocate was most unpopular with the Episcopalians and Tories, who regarded him as their inveterate enemy. They did all they could to discredit him in the eyes of public men in England. Soon after his appointment Lockhart of Carnwath published, in London, a pamphlet which professed to describe the position of the Episcopal clergy in Scotland.¹ It was a violent attack on the Lord Advocate. After describing the effects of the judgment of the House of Lords in favour of Greenshields, he went on to say, "During these last six months the Church party in Scotland have enjoyed more peace and security than they have done for twenty years before. But behold, all of a sudden, and without any reason why, the case is altered; for no sooner did Sir James Stuart (about two months ago) succeed Sir David Dalrymple as Her Majestie's advocat generall, than he began, as he left off when formerlie in that station, to persecute the Episcopall clergy with all the violence in his power." He then proceeded to give an account of "this gentleman's life and conversation." The Lord Advocate was the son of a notable rebel, and had imbibed the pernicious principles of his father; he was the chief contriver of rebellion during the reign of Charles the Second; to save his neck he fled from Britain; returning under James, he wrote a book in favour of absolutism, which was

¹ "A letter from a gentleman in Scotland to his friend at London, giving an account of the present proceedings against the Episcopall clergy in Scotland, for using the English Liturgy there." Lockhart Papers, i. 548.

answered by Fagel, "both which books are no doubt to be had in London;" he betrayed James in his hour of need; and "for other good services never yet made publick, he was, soon after the Revolution, appointed King William's Advocate Generall;" as Advocate he was an intolerant persecutor till replaced by Dalrymple, under whom, "tho' he was Whigishly enuff inclined too," the Episcopalian clergy had some rest; on the return of Stewart to power, things became as bad as ever; "if he continue at the rate he has begun there will be no living in this country." Lockhart also attacked Sir Gilbert Elliot of Minto, one of the judges, whom he accused of acting as a "factious, furious, and revengefull judge" at the trials of those who had broken the laws against nonconformity. The letter concluded with a hope that the Government would, in the next session of Parliament, provide for the protection of the Episcopalian nonconformists, and "call the Advocat Generall and the aforesaid judge to account for their illegall, irregular, and unwarrantable proceedings."

Mere personal dislike to the Lord Advocate and Sir Gilbert Elliot was not Lockhart's motive in writing this letter. It was written for the purpose of rousing in London a feeling of sympathy with the Scottish Episcopalians. On the 21st of January leave was given, in the House of Commons, for the introduction of the Toleration Bill. This famous measure of justice gave to Episcopalians the right of meeting to worship under their own forms. It annulled all penalties for attending an Episcopalian meeting-house. It not only declared that magistrates were bound to protect Episcopalians as well as Churchmen, but imposed penalties on those who disturbed the nonconformists in the exercise of their religious worship.¹ The bill was opposed by the Established Church. Carstares, once the most trusted adviser of

¹ 10 Anne, cap. 10.

William the Third, and now Principal of the University of Edinburgh, pleaded against it before Parliament. Sir David Dalrymple made a long speech, at which Lockhart must have been disgusted, for it was as strong against toleration as anything Lord Advocate Stewart, had he been in Parliament, could have said. When the third reading was carried he is reported to have exclaimed, "Since I see the House is resolved to make no alterations in the body of the bill, I acquiesce, and only desire the title of it may be this: A Bill for establishing Jacobitism and Immorality."¹

It was on the 3d of March that the Toleration Act received the Royal assent. Ten days later a motion was made in the House of Commons for leave to bring in a bill to restore Lay Patronage in the Church of Scotland. It was carried by a majority of seventy-seven votes. For more than two years it had been known that a movement was going on for the restoration of Patronage. It began among the gentry of the west of Scotland; and, although attempts were made to effect a surprise, the secret leaked out. But it was not till the Toleration Bill was before Parliament that the people of Scotland knew that the restoration of Patronage was to be immediately proposed. When the bill was brought in, Dalrymple wrote a pamphlet, in which he opposed the measure. The pamphlet attracted attention. It was known that he was the author. Nevertheless, although he had written against Patronage, and was no longer Lord Advocate, the Government consulted him on the subject. Three Scottish members brought in the bill: Murray, member for Dumfriesshire; Mackenzie, member for Inverness-shire; and Carnegie, member for Forfarshire. But there is strong reason for thinking that Dalrymple prepared

¹ Commons' Journals, 21st January to 26th February 1711½; Lords' Journals, 8th February to 3d March 1711½; Tindal, ii. 244; Wodrow's *Analecta*, ii. 7. The Toleration Act passed the Commons by a majority of 135; Ayes, 152; Noes, 17.

it. For one clause, at least, he is known to have been responsible. This was the third clause, which provided that when a patron did not present to a living for six months after a vacancy occurred, the right of presentation should fall to the Presbytery in which the living was. It was believed, among Churchmen of the type of Wodrow, that this clause was put in for the express purpose of preventing the exercise of Patronage by the lay patrons; for it was thought that the Church of Scotland was so opposed to Lay Patronage that more than six months would always elapse before the patron could find a minister to accept a presentation. But, in reality, not much thought was given to what would or would not please the Church of Scotland. The great object of the party in power was to pass the bill before the General Assembly met on the 1st of May. No time was wasted. The bill, which was read a first time in the House of Commons on the 20th of March, was read a third time and passed by the House of Lords on the 12th of April.¹

While these measures were passing through Parliament, the Lord Advocate, who had no seat, was in Edinburgh, busy with ecclesiastical affairs. Under the Toleration Act both Presbyterians and Episcopalians had to take the Abjuration Oath. This was merely a promise to maintain, against the Pretender, the succession to the throne as it stood settled by the English Acts. But the terms of these Acts implied that the monarch must be a member of the Church

¹ 10 Anne, cap. 21; Wodrow, *Analecta*, iii. 358; Wodrow Correspondence (Printed), i. 277; Lockhart Papers, i. 378, 385. A Collection of Papers against the Scots Toleration and Patronages, Pamphlets, Advocates' Library, 233; Commons' Journals, 13th March to 28th April 1711 $\frac{1}{2}$; Lords' Journals, 8th April to 12th April 1711 $\frac{1}{2}$. The Royal assent was given to the Patronage Act on the 22d of May. On the same day another Act became law which ordained the Court of Session always to adjourn for Christmas Holidays, from 20th December to 10th January. This Act repealed a Statute (1690, cap. 22), which all Presbyterians in Scotland regarded as one of the bulwarks against Popery. "This," Burnet says, "was intended only to irritate them:" History of His Own Times, iv. 358.

of England. This raised scruples in Scotland. Stewart wrote a pamphlet on the subject, and acted on a committee appointed by the General Assembly to report upon the Oath. It was at a meeting held in his house in Advocate's Close that the address to the Queen, which explained the difficulties of the Church, was prepared.¹

Twelve months later, on the 1st of May 1713, Stewart died, in the circumstances described in the last chapter.² "Thus," said Wodrow, "we have lost the greatest lawyer, and the best Christian, at least in his station, that we ever had."

On the death of Stewart, his son, Sir James, and Thomas Kennedy, the Solicitors-General for Scotland, were directed to "supply the place of my Lord Advocat."³ At that time neither had a seat in Parliament. But in August Parliament was dissolved; and Stewart stood for the city of Edinburgh, probably in the hope of succeeding his father as Lord Advocate. He was returned. But Sir David Dalrymple was re-elected for the Haddington burghs, and his claims to office were pressed by his friends. No Lord Advocate was appointed. Stewart and Kennedy, the Solicitors-General, performed the legal duties of the Advocate. Months passed; and it was rumoured that the office of Lord Advocate was to be abolished, in order to save the salary. This raised an outcry in Scotland, which forced Ministers to fill the vacancy; and, on the 30th of March 1714, Kennedy was appointed.⁴ Of the new Lord Advo-

¹ Wodrow Correspondence (Printed), i. 296; Acts of Assembly, 14th May 1712.

² *Supra*, p. 277.

³ MS. Record Office, 23d May 1713.

⁴ Books of Sederunt, 1st June 1714. "Young Sir James Stewart (son, but in all respects inferior to the other Sir James) was Solicitor, and though several remonstrances had been made against him, yet could they never prevail till now that having made in the House of Commons a virulent senseless speech against the Queen's administration, I was sent to tell my Lord Oxford that if he was not immediately laid aside we would move the House to address the Queen to that purpose, which had the desired effect, and Lord Bolingbroke's friend, Mr. Carnagy, succeeded him." Lockhart Papers, i. 459. Carnegie presented his commission as Solicitor-General on the 23d of July 1714: Books of Sederunt.

cate Lockhart says that, "Though not perhaps so tight a Tory as could have been wished, (he) was much preferable to any of his predecessors, and there was little reason to doubt his concurring with the Queen's measures." He was in office, however, for only six months. On the accession of George the First the Whigs regained power; and Dalrymple was re-appointed Lord Advocate on the 9th of October 1714. Sir James Stewart, at the same time, became sole Solicitor-General.¹

When first appointed Lord Advocate, in 1709, Dalrymple had to contend against difficulties which were caused by the religious jealousies of the people. But now affairs were in a more critical condition. The first Jacobite rebellion was at hand. Just before the death of Queen Anne there was an uneasy feeling, in Scottish political circles, that the Jacobites were secretly at work. But nothing was known which could justify serious alarm. The Queen died on the 1st of August 1714. The proclamation of King George took place without disorder. The London announcement of his Majesty's accession was reprinted in Edinburgh, and circulated through the country districts, where it was quietly received. The summer passed away, and when the Court of Session met for the winter sittings all was quiet; but it was not long before warnings of the coming storm were seen.

Dalrymple was concerned in a curious episode in the literary history of Scotland, which was one of the incidents of the attempt now made by the Stuarts to regain the throne which they had forfeited. A manuscript, entitled "Memoirs concerning the Affairs of Scotland," was placed in the hands of Government. It was found to be a Jacobite history of Scotland commencing at the Revolution. The writer had done all in his power to vilify the leading Whig statesmen of the day, to attack the Revolution principles, and to pro-

¹ Books of Sederunt, 2d Nov. 1714.

mote the interests of the House of Stuart. Dalrymple was requested to examine the Memoirs. He at once suspected that the author was George Lockhart of Carnwath. Lockhart, who, like every Scottish Tory, hated the Established Church, had been the leader of the movement which brought about the restoration of Lay Patronage; and since then his whole energies had been devoted to promoting the cause of King James, whose return, he hoped, would soon complete the overthrow of the Whigs. His Jacobitism was, even in the eyes of the Jacobites themselves, absurdly violent; and the Memoirs, Dalrymple thought, were probably written by him. It is the fact that he was the author. He had rashly lent his manuscript to a friend, under promise of secrecy. This friend, wishing to preserve a copy for private use, had foolishly hired a clerk to transcribe it. The clerk made several copies, one of which found its way into the hands of the Ministry. Although the Memoirs had been read aloud as "useful lectures" after supper at Jacobite houses, Lockhart probably did not intend his work to appear in print until a restoration of the "Royal Family" had taken place. But it was now published by Lord Advocate Dalrymple, for the purpose of exposing the system of Jacobite intrigue which was laid bare by the author.

To the Memoirs Dalrymple prefixed an introduction, in which he criticised the work, and attacked the author. "The following sheets," he says, "one may readily discern, were designed for the triumph of another day, a day which would extinguish the very name of liberty, and even the form of religion among us, and which all true Britons deprecate, and never desire to see fill up a space in their Kalendar; and what perhaps might have been designed to make a merit upon the arrival of a Pretender, is now sacrificed to a more glorious occasion, and published to dispossess some unhappy people of their prejudices, and give all King

George's subjects an abhorrence of those wicked practices which were levelled at the happy Revolution, and consequently at the title of our present King."¹ After defending the Whig statesmen against the abuse of Lockhart, he gives the following key to the terms used by the author of the *Memoirs*:—"When the reader finds the terms Cavalier, Royal Family, Prince, King, Episcopal, dispersed through these *Memoirs*, he cannot be at a loss for the meaning of them, they being terms of great significancy amongst the faction; but in Revolution dialect go for no more than Jacobite, a spurious issue, Pretender, Mock Monarch, and Popish persuasion."² He concludes by drawing a lesson from the Jacobite attempt of 1708, and asks, "What rancour, what hellish malice may not King George expect from a faction who put their country in a flame to oppose his succession, and were reducing it to an heap of ruins, to prevent his being sovereign of the soil?"

The publication of the *Memoirs* excited conflicting emotions. The Jacobites were in consternation at finding themselves betrayed. The Whigs were delighted at possessing an armoury of facts and arguments against their opponents. But the *Memoirs* were forgotten when civil war commenced. It was about the middle of December 1714 that a spirit of open disaffection to the Government began to appear. In several towns persons were arrested for using seditious language; and in the country districts outrages were committed.³

¹ Lockhart Papers, i. 10.

² *Ibid.* 17.

³ In Edinburgh the Jacobites sold in the streets a document which they called a Letter written by the Lord Advocate, and an Answer to the supposed statements of his Lordship. The sale went on for a few days, when an order was issued prohibiting it; Hist. MSS. Com. 3d Rep. 372; Lockhart Papers, i. 581, 612. One outrage was committed at Crieff, a village in Perthshire, where a party of men in disguise entered at night the house of an exciseman, pulled him out of bed, and cut off one of his ears. Rob Roy afterwards appeared in Crieff, and drank a health "to those honest men and brave fellows (who) cut out the gadger's ear!" Hist. MSS. Com. 3d Rep. 375, 378.

Dalrymple spent the Christmas vacation at New Hailes, his country house near Edinburgh. The Courts reassembled on the 11th of January 1715, and the annual meeting of the Faculty of Advocates was fixed for the 21st. The Tory members of the bar had resolved to bring forward a motion in favour of a dissolution of the Union. This was known in the city, and so great was the public interest in the expected discussion that wagers were freely made on the result. The meeting of the bar took place. The Lord Advocate was re-elected Dean of Faculty for another year, and took the chair. The motion against the Union was made; but Dalrymple stopped the proceedings by ruling that it was incompetent for the Dean of Faculty to sign a political resolution.¹

The spring and summer passed away amidst intrigues which are a part of general history. The standard of the Pretender was raised at Braemar on the 1st of September 1715. In February 1716 the Rebellion was at an end.

Lord Advocate Dalrymple had a strong opinion as to what ought to be the policy of Government in dealing with the rebel prisoners. His view was that if severe measures were taken the result would be a feeling of hatred against the House of Hanover, which would lead to another rebellion. The official correspondence of the time shows the difficult position in which the Government officials in Scotland were placed. The prisoners were numerous; the expense of keeping them was considerable; and it was impossible to avoid a feeling of sympathy for men, a large number of whom had been forced against their will to join the rebel army.² In Glasgow alone there were three hundred and fifty prisoners. They were crowded in a few

¹ Hist. MSS. Com. 3d Rep. 372. The motion as to the Union is not mentioned in the Minutes of Faculty of 21st January 1715. These minutes were written in last century with such caution that they afford little historical information.

² Justice-Clerk Cockburn to Stanhope, 21st February 1715-16, Scot. MSS. Record Office.

narrow cells. The strongest of them were sickly; most of them were covered with ulcers; the stench was so horrible that the turnkeys refused to go near them; and the magistrates petitioned Government to release them, or, at all events, to remove them from the city.¹

Dalrymple was so shocked by the unhappy condition of the rebels that he presented to the Principal Secretaries of State a printed "Memorial concerning the prisoners on account of the late Rebellion."² It is a pamphlet of ten pages, written in a popular style, and evidently intended for general circulation. He pleads strongly against a system of indiscriminate forfeitures; he suggests that a pardon should be granted to all those prisoners who had been forced into the Rebellion, and to all who were under age; and he begs that they may not be kept in confinement through the summer.

When Lord Townshend read the Memorial he declared it meant that every rebel in Scotland was to escape; and the Lord Advocate, on his arrival in London, found himself in bad odour with the Ministry. The members of the Government did not, he says, "speak one word to me of business, nor have they to this hour, though the character I serve in, one should think, made it decent to have done so."³ He received several hints from persons in the confidence of Ministers that his place was in danger. His nephew, the Earl of Stair, was asked to remonstrate with him for opposing the views of the Government, and urge him to act along with the Duke of Roxburghe, who was at that time Secretary of State for Scotland.⁴ It was even thought likely that he would be dismissed. When the Duke of Argyll was removed from office, one of Lord Stair's friends, after men-

¹ MS. Record Office, dated 13th April 1716.

² Pamphlets, Advocates' Library, 287.

³ Dalrymple to Stair, 23d June 1716, Stair MSS.

⁴ Robethon to Stair, 4th June 1716, Stair MSS.

tioning that event, went on to say, "I as yet hear that another, much nearer to your Lordship, is about to know his fate: but to-night what that may end in even Oxford himself does not know: though 'tis certain that never Lord Advocate was outed with a more universal regret of his own country."¹

Duncan Forbes, a son of the well-known Highland family of Culloden, was at this time senior Advocate-Depute. He agreed with the views of the Lord Advocate, and declined to prosecute any of the rebels unless signed Informations were laid before him. No one could be found to lodge these documents; and the judges were puzzled what to do. The prisoners were confined without the Informations which the law required. This was objected to as being illegal; and it was said that applications would soon be made for their release.² In July the Lord Advocate went to Germany. "My health," he said before leaving, "is so bad that I am resolved to go to the German Spa." But had there been no State prisoners awaiting trial, he would probably have regained his strength at Bath or Tunbridge Wells. Throughout the rest of the summer communications are constantly passing between the officials in Scotland and the Government in London as to the treatment of the prisoners. Solicitor-General Stewart presses for "speedy measures" against them; and the Justice-Clerk complains that the trials are put off, "the Advocate having turned his back upon his office at this time."³

At last the Government resolved to bring some of the prisoners to trial. By law persons accused of treason committed in Scotland should have been tried in Scotland. But a Scottish jury was, at that time, as unwilling to convict a

¹ Mackenzie to Stair, 5th July 1716, Stair MSS.

² Lord President Dalrymple to Loudoun, 30th June 1716, Scot. MSS. Record Office.

³ Scot. MSS. Record Office, August 1716.

Scottish rebel, as an Irish jury, at the present time, is to convict an Irish rebel. The Government knew this, but had found a way out of the difficulty. One of the recent Coercion Acts could be read so as to allow the trials to take place in England. There were in the Castle of Edinburgh eighty-nine prisoners; and it was decided to send them for trial to Carlisle. Duncan Forbes refused to appear for the Crown out of Scotland; but two members of the bar, Robert Craigie and Alexander Gardner, were specially appointed "assessors and assistants" to the Lord Advocate and Solicitor-General.¹ The Lord Advocate was absent; but the Solicitor went to Carlisle, where he had the help of the Solicitor-General for England. In the beginning of September the prisoners reached Carlisle, where they were crowded into three chambers in the Castle, a moist and unwholesome place, in which they suffered great misery and privation. It was resolved to try all against whom the Grand Jury returned true bills. There was a private understanding that only three were to be executed, and that the judges were to be allowed to say who ought to die. In the end most of the accused pled guilty, and threw themselves on the mercy of the Crown. Those who did not plead guilty were defended by members of the Scottish bar, who attended for the purpose. They had a fair trial, and the judges were merciful. Some were acquitted; and sentence of death was not pronounced on those who were condemned.²

¹ Craigie was himself Lord Advocate of Scotland during the Rebellion of 1745.

² The progress of the trials at Carlisle in 1716 may be traced in the entertaining letters of Bishop Nicolson of Carlisle, which are preserved in the British Museum. The Bishop constantly complains of the way in which he was invaded by the lawyers. "They," he says on one occasion, "and Lord James Murray, etc., have threatened to dine with me to-day. But perhaps the change of the weather (tho' they have nothing to do at Carlisle before to-morrow) may possibly prevent their coming. However, a fair competency of powdered Beef and Cabbage is provided for them by yr Grace's most obedient servant, W. CARLIOL." "On Monday last I was surprised with a visit from the two Solicitors-General (of England and Scotland) and all the King's Counsel,

Dalrymple continued Lord Advocate, in spite of the way in which he had "turned his back on his office." This was probably owing to the influence of Lord Stair. Stair's influence rested on different gifts from those which had distinguished his father, the famous politician, and his grandfather, the great jurist. His picture hangs on the walls of New Hailes, side by side with those of his illustrious kinsmen. In his face the eye misses that appearance of commanding intellect which is so marked in the features of the President and his eldest son. But he had talents peculiar to himself. He was admired as one of the most perfect courtiers of the day; and he was known to be a brave soldier and a skilful diplomatist. These qualities, and the fact that he had done good service to Government at the crisis of the Rebellion, enabled him to protect his uncle the Lord Advocate. The Duke of Roxburghe, Secretary of State for Scotland, was anxious to act along with Dalrymple. "I do assure your lordship," he writes to Stair, "that what Sir David said to me when he was here gave me great satisfaction, and I have not the least doubt of his doing what he can to make the post I am in easy to me."¹

The next step taken by the Government was as much disliked by the Lord Advocate as the trials at Carlisle had been. He had opposed the Treason Act of 1708 in his place in the House of Commons. It was now to be, for the first time, put into active operation. "One thing," he writes to his nephew, "I beg leave to observe; there is a Commission of *Oyer and Terminer* either sent down, or just ready to be sent down to Scotland, for trying or finding bills against those who have fled beyond seas, which, in my judgment, will be not only fruitless, but hurt the Government if it miscarries." This Commission had been prepared by the who having that day at their own disposal, very kindly disposed it in dining with me." Nicolson MSS. (Add. MSS. 6116, British Museum).

¹ Roxburghe to Stair, 10th Jan. 1717.

Attorney-General; and two English barristers, Willes, then a King's counsel and afterwards Chief-Justice of the Common Pleas, and Serjeant Hanbury, were appointed to conduct the prosecutions. Dalrymple's prediction was verified. The Commission sat first at Perth on the 17th of September 1718, where the Grand Jury repeatedly refused to find true bills. Willes blamed the Lord Advocate. "I am afraid," he wrote to the Duke of Roxburghe, "it will be difficult in any other county, so long as a person now in England, and of great power as well as in a great post here, has the faculty of contriving objections; for I find that all which have been started by him are current for law, and it is absolutely impossible to persuade the people to be of a different opinion." From Perth the Commission went to Cupar, in Fifeshire, where the Grand Jury returned true bills against Thriepland of Fingask and others; but nothing more was done. At other places the Grand Juries could not be induced to return true bills. The Commission was a failure.¹

For a year and a half more Dalrymple retained his office of Lord Advocate. But his position had been precarious ever since the close of the Rebellion. Not only had he left the country to avoid prosecuting the rebels; but he had opposed the whole policy of repression. In particular he had resisted, in every possible way, the Forfeited Estates Bill, which he used to call "that damned bill of sale." In the House of Commons he had spoken against it; and after it became law he put obstacles in the way of the Commissioners who were appointed to carry it into effect. He was at last forced to resign. "My master," he writes, "does me

¹ Hill Burton, *Hist. Scot.* (1689-1748), ii. 218; Stair, *Annals*, ii. 55-58, 348; Stanhope to Attorney-General, 16th April 1716, Scot. MSS. Record Office. On hearing the result of the first sitting of the Commission, Mr. Secretary Craggs writes to Lord Stair:—"Upon my soul, it is a shameful proceeding, and I wish our friend Sir David, whom I love as well as you, has not, out of good-nature, nationality, and taking a bottle of wine now and then with some honest lad who has interceded for them, contributed a little to it."—Stair, *Annals*, ii. 372.

the justice to say that I have served him faithfully, but that, having declared my sentiments against some measures thought necessary for his service, it was thought better for me not to be drawn to work in their extension, and better for the service that they should be carried on by people who approve them heartily, and are ready to assist one another.”¹

In May 1720 he retired from the office of Lord Advocate, and was appointed an Auditor of the Exchequer. As this was an office of profit under the Crown, he feared that it had been given to him in order to vacate his seat in Parliament, and render a new election necessary, when he might be opposed and perhaps defeated. But in this he was mistaken. Orders were given that he should not be opposed by any Government candidate. He was re-elected for the Haddington burghs on the 11th of July 1720, and was a member of the House of Commons till his death, which took place in the following year.

On Dalrymple's retirement, the office of Lord Advocate was at once bestowed on Robert Dundas, who had been Solicitor-General for the last three years. Dundas was the third of his family who had risen high in the profession of the law. His grandfather was James Dundas of Arniston, a Covenanter, who had lost his seat on the bench for refusing to abandon his principles at the Restoration. His father, Robert Dundas, was made a judge by the Whigs at the Revolution, was a judge and member of Parliament for Midlothian from that time till the Union, and was still alive and on the bench when his son became Lord Advocate.

Dundas was called to the bar on the 26th of July 1709, and, after eight years of practice, became Solicitor-General in the summer of 1717, when Sir James Stewart was dismissed.

¹ Stair, *Annals*, ii. 150.

While Solicitor-General, Dundas was more trusted by the Duke of Roxburghe, then Secretary for Scotland, than the Lord Advocate himself. Dalrymple's opposition to the policy of Government had deprived him of all influence; and it was Dundas who was consulted by Ministers, who did not attempt to conceal the indifference with which they regarded the opinions or wishes of the Lord Advocate.

Even when the Lord Advocate was in London, Dundas was sometimes asked to come from Scotland and give his advice on subjects which had not been mentioned to Dalrymple. One of these visits to London took place in December 1719. Before leaving Scotland the Solicitor-General appointed a Depute, with full powers to carry on all actions before the Civil and Criminal Courts on his behalf, "and generally anything to do in any matters, Civil, Criminal, or Ecclesiastick, appertaining to my office, and which I myself might or ought to do if personally present."¹ The advocate who received this appointment was Robert Craigie, who has already been mentioned as one of the counsel for the Crown at Carlisle. The judges of the Court of Justiciary seem to have objected to the appointment of Craigie on the ground that the Solicitor-General had no power to appoint a Depute to appear for him in Court. What took place does not appear from the record of Court. Walter Stewart, afterwards Solicitor-General, presented, on the 28th of December, a deputation from the Lord Advocate, and thereafter acted as Advocate-Depute.² Nothing is said about Craigie; but that some difficulty had been raised about his appointment is evident from the following letter which he received from the

¹ Glendoick MSS.

² Books of Adjournal, 28th Dec. 1719. In Scotland the Solicitor appears in prosecutions merely as an Advocate-Depute. In England, "the Solicitor-General is the *Secundarius Attornatus*; and as the Courts take notice judicially of the Attorney-General when there is one, they take notice of the Solicitor-General as standing in his place when there is none." *Memoirs of Chief-Justice Wilmot*, 329, 330.

Solicitor-General, to whom he had reported what had taken place. "I have," Dundas wrote, "the favour of one from you by last post. As for the Lords of Justiciary their resolution, it is, like some others, taken without thinking. I believe they had no reason to imagine that I thought Sir David's deputation to me gave me a power to name an Advocat Depute. I never thought it gave me any power but what I had without it. But what I will always think is that in the absence of the Advocat, my Commission from the King gives me power to act for the King's service in every way the Advocat can; and of consequence that when I am called likeways to be absent, I can grant a deputation for myself, and that the person there named must by that have power to act in the King's service where there is no Advocat nor Depute of his upon the place. And I do likeways think, with great respect to them, that the tryalls might have gone on without any deputation, for by my signing the Indictments I once sisted myself pursuer, and I know no law that oblidges the Advocat to be personally present at every step of a process. However, it's not worth while to dispute with them on those points. The deputation for Mr. Stewart had been neglected till I came here; but it was sent down the next day, and although it was designed you should have been joined in it, I did not think it proper to delay the sending of it down untill it should have been got renewed, Sir David being out of town, but choised rather to let it go, and that another conjoining you should be sent down afterwards, and the rather that it could not be done untill the matter should be mentioned to the King, which the Duke of Roxburgh did, in my presence, on Munday last. But Sir David, keeping himself out of the way, makes those things go very slow. I have not seen him. I hear he says he is sick, and I believe will be so for two months to come. In the meantime, I hope you'll give Mr. Stewart your assistance; you

know he is so tender that he will not well be able to sitt out a Sederunt in the Court. There is no particular news here. My Lord Stanhope is expected in a very few days here, which is a mark that affairs are going well enough abroad; and as for matters here, all I shall say is, that there are some folks not half so great here, as their friends would make us believe in Edinburgh.”¹

The person alluded to at the end of this letter was probably the Lord Advocate, for whose office Dundas was now eagerly waiting. In May 1720 Dalrymple resigned, and Dundas succeeded him. One of the first letters which he wrote was to his friend Craigie: “His Majestie having been pleased to appoint me to be His Advocat, and Mr. Walter Stewart Solicitor for Scotland, and there being, as you know, several tryals to be caryed on at Couper, against the rioters, where I cannot attend in person, I hope you’ll forgive me that I have insert your name with Mr. Hugh Dalrymple in a deputation which you’ll find in the Clerk of Court’s hands. . . . It’s very probable you may find some of the judges scrupulous as to going the length of the paines of Death against those to whom the Proclamation was read, and that they may desire you to restrict the Lybel to an arbitrary punishment. But, sir, I must give it you as a positive instruction not to restrict where you see the proofs will answer. For there must be some examples made if possible, and if their Lordships will not obey a plain Law, it must be upon them to answer for it. Mr. Dalrymple hath the principal precognitions in his hand. Wishing you good success, which, if you have, I lay my account with it, *it will be in spite of Judges, Witnesses, and Jury*, I am, with all friendship, Sir, your most obliged and humble servant.”²

After Sir David Dalrymple retired from the office of

¹ Dundas to Craigie, 9th Jan. 1719, Glendoick MSS.

² Dundas to Craigie, 23d May 1720, *ibid.*

Lord Advocate, and became an Auditor of Exchequer, he still retained the position of Dean of Faculty. The Government in London and the bar of Scotland were often opposed on matters of vital importance. But at that time no objection was ever raised to appointing the first law officer of the Crown Dean of Faculty; and, on the death of Dalrymple, Dundas became the official head of the bar.

Dundas was not in Parliament when he became Lord Advocate. But in the spring of 1722, when Parliament was dissolved, he stood for Midlothian. There was no opposition, and he was returned. The Tories, however, believed that the Government was so unpopular that it would have been easy to defeat the Lord Advocate. On the morning of the election Lockhart of Carnwath was asked to stand, and an assurance that he would be returned was given to him. He declined to oppose Dundas. "Several of my friends," he says, "it being by no means fit to communicate my private reasons to them, blamed me for assisting the Advocate, who is a man so capable to make a figure." What these private reasons were he explained in a letter to the Pretender, who was carefully watching the progress of the general election. Two years before, when the Commission under the Forfeited Estates Act was sitting, he had made a bargain with the Lord Advocate. The bargain was, that if the Lord Advocate would save the estates of certain Jacobites from forfeiture, he, in return, would secure the Lord Advocate's election for Midlothian. The Lord Advocate had fulfilled his part of the bargain, and Lockhart felt bound in honour to support him.¹

For the next three years Dundas was Lord Advocate. In 1725, when the Walpole Administration was formed, he retired and went into active opposition. His opposition was more than active; it was factious and unreasoning. In the

¹ Lockhart Papers, ii. 88, 89.

next chapter it will be seen how, along with the Duke of Roxburghe, he seriously embarrassed the Government on matters which ought to have been outside the sphere of party politics, and brought about a crisis which led to the abolition of the office of Secretary of State for Scotland.

In politics the conduct of Dundas was often blamable. But as an advocate he was at the head of the bar. He was a great lawyer and an eloquent speaker. As a criminal counsel he was pre-eminent. The most important criminal case in which he was engaged was the trial of James Carnegie of Finhaven, before the High Court of Justiciary, for the murder of Charles, Earl of Strathmore. The facts which led to this trial give a curious picture of the social life of those times. In the first week of May 1728, Lord Strathmore, Lord Rosehill, Carnegie of Finhaven, and some other gentlemen, met in the little county town of Forfar. They had been at the funeral of a daughter of Carnegie of Lour, and had dined at Lour's house in Forfar. After drinking a great deal, they went to the house of Mrs. Lyon of Auchterhouse, Finhaven's sister, where they drank for some time. One of the party was Lyon of Bridgeton, a quarrelsome bully, who, as the company became drunk, insulted Finhaven in the grossest manner. They all left the house. In the street, Lyon, exclaiming "Go, and be damned, you and your King George, whom you love so well!" knocked Finhaven down. Finhaven fell into the gutter, which was deep, and full of dirty water. One of Lord Strathmore's servants helped him up. He drew his sword, and staggered after Lyon, who ran to Lord Strathmore and tried to draw his sword out of the scabbard. There was a scuffle. Finhaven tried to hit Lyon; but just as he delivered his point, Strathmore came between them and was run through the body. Lord Rosehill and the others at once disarmed Finhaven, who, drunk and covered with mud, reeled away

to his sister's house. There was no physician in Forfar; but the Provost, who was an apothecary, dressed the wound, and sent to Dundee for help. Several doctors came; but in forty-eight hours Lord Strathmore died.

Carnegie was indicted, for wilful murder and culpable homicide, at the instance of the Countess of Strathmore and the kinsmen of the late Earl, with concurrence of Lord Advocate Forbes. Dundas, along with five junior counsel, was retained for the defence. The pleadings on both sides of the bar were long and intricate; but the trial is chiefly memorable, in the history of Scottish criminal law, because it restored to juries in Scotland the right of judging on the law as well as on the fact. The old verdicts had been "fylit," that is, fouled, guilty; or "clensit," that is, clean, not guilty. But, to suit the purposes of the Government of Charles the Second, the judges had restricted the juries to the words "proven," or "not proven." By this means the jury could not return a general verdict on the guilt or innocence of the accused. All they could do was to say whether or not it had been proved that the accused had done certain things which were charged against him. The judges claimed the right of saying whether the acts charged were or were not criminal. Dundas now succeeded in vindicating the right of the jury to return a general verdict of guilty or not guilty; and he had thus the honour of defending the liberty of the subject in the same way as Erskine defended it, long afterwards, in the English State Trials. After a lengthy trial the jury returned a verdict of not guilty, and Carnegie was dismissed from the dock.¹

The drinking habits of the Forfarshire lairds were not peculiar to themselves. Dundas seems to have been a famous toper, even in those days of heavy drinking. Sir Walter Scott tells a story of his convivial ways. An Edin-

¹ State Trials, xvii. 73-151.

burgh writer went to consult him, while he was Lord Advocate, about the preparation of an appeal case. It was Saturday; the Court had risen; and Dundas was about to mount his horse, and ride to Arniston. The writer had much difficulty in persuading the Advocate to go "for half an hour" to a neighbouring tavern. But when the half-hour was passed Dundas had become so interested in the case that he put off his ride home until the cool of the evening. "The horses were directed to be put in the stable, but not to be unsaddled. Dinner was ordered, the law was laid aside for a time, and the bottle circulated very freely. At nine o'clock at night—after he had been honouring Bacchus for so many hours, the Lord Advocate ordered his horses to be unsaddled, paper, pen, and ink to be brought—he began to dictate the appeal case, and continued at his task till four o'clock the next morning. By next day's post the solicitor sent the case to London, a *chef-d'œuvre* of its kind, and in which, my informant assured me, it was not necessary on revisal to correct five words."¹

In December 1736 Sir Walter Pringle of Newhall, one of the judges of the Court of Session, died. The judges were to attend his funeral clad in their robes of office. Dundas, as Dean of Faculty, called a special meeting of the bar to consider whether the advocates should also attend. A search was made in the records of the Faculty for precedents; and it was found that there was no case of the bar going, as a body, to the funeral of a judge. The Faculty decided that to do so in the case of Lord Newhall might bring the bar "under the dishonourable necessity of paying extraordinary outward compliments in future times, where equal merit may not call for the same inward respect." A resolution was, therefore, adopted "not to attend the funeral with any such transient formalities, but to give this more

¹ Notes to Guy Mannering, No. 9.

lasting testimony of their highest esteem and honour for so distinguished a merit and character." An elaborate eulogy on the late judge, composed by Dundas, was accordingly inserted in the records of the bar.¹

Dundas himself succeeded Newhall, and took his seat on the bench with the title of Lord Arniston, on the 10th of June 1737. "His own idea," says one of his successors, "both of a lawyer and of a judge, remains, penned by himself, in that admirable eulogium on Lord Newhall, which stands upon the records of the Faculty of Advocates; and those who yet remember the man of whom we speak, know that many of those various accomplishments, which he there applied to another, were in a peculiar manner his own."

After Dundas had been an ordinary judge for ten years, the death of Duncan Forbes of Culloden left a vacancy in the office of Lord President. He was appointed, and was head of the Court of Session until his death, which took place on the 26th of August 1753.

He left behind him two sons. One of them, Robert Dundas, was Lord Advocate and President of the Court. The other was Henry Dundas, afterwards Viscount Melville, the distinguished statesman who managed the affairs of Scotland, with so much tact and ability, for more than a quarter of a century.

¹ Minutes of Faculty, 17th Dec. 1736.

CHAPTER XI.

DUNCAN FORBES OF CULLODEN.

A SHORT distance to the east of the town of Inverness lies Culloden Moor; and on the northern margin of this famous battle-field, close to the shore of the Firth of Beauly, stands the mansion-house of Culloden. It is now a modern country house, surrounded by woods and pleasure-grounds. But in the lawless days at the beginning of the eighteenth century it was a strong building, well adapted for defence in time of need. The grey walls were thick, and the windows were small. The country for miles round was covered with heather, and there were few trees in the park, which was enclosed by a low wall of loose stones. But in the cheerful hall within numerous guests were entertained, for in the family of Culloden hospitality was held to be a sacred duty. When a guest rode up to the door, he was met by the master of the house, who made him "crack the nut," which was to drink a cocoa-nut shell full of wine; and during his stay he always found a hogshead of claret standing on tap in the hall.¹

The founder of this hospitable family was Duncan Forbes, a merchant of Inverness, who bought the estate of Culloden in 1625. Grey Duncan, as he was called, died in 1654. He was succeeded by his son John. John left the property, increased in value, to his son Duncan. Duncan

¹ Culloden Papers, Introduction, xx, xxii.

married Mary Innes, the daughter of an old Morayshire family, and had two sons, John and Duncan.

Duncan, the future Lord Advocate, was born on the 10th of November 1685. He and his elder brother were educated at Inverness and Edinburgh. In 1704 their father died. John settled at Culloden, and Duncan began to study for the bar. For some time he attended law classes in Edinburgh; and one incident of his student days shows how, even then, he displayed that sturdy independence which was so marked a feature of his character through life. He was present at the trial of Captain Green, and formed the opinion that the prisoner's only offence was being an Englishman. He was so horrified at the weakness of the Scottish Privy Council in signing the order for Green's execution, that he went with the convicted man and his unhappy comrades to the scaffold; and when the execution was over, at the risk of his own life he laid Green's head in the grave, to which he believed he had been brought by the injustice and prejudices of the people of Scotland.¹

From Edinburgh Forbes went to Leyden, where he remained till 1707. On his return to Scotland he passed advocate on the 10th of July 1709.

For some years he had little practice. But he was personally popular. Hard drinking was then the fashion; and Duncan Forbes and his brother were known as the "most plentiful drinkers in the north."² The laird of Culloden was nicknamed Bumper John; and of his brother Duncan many curious anecdotes are told. One story of his early days, which even when Lord President he used himself to tell, is to the following effect. He was spending an evening at Inverness in the company of five ladies of position in the county. To entertain them he told tales and talked

¹ Parl. Hist. x. 284.

² Pamphlets, Advocates' Library, 702.

as much as he could; and as he talked he primed himself with wine, until at last he became drunk, and fell asleep. The ladies rose. Four of them took hold of his legs and arms, while the fifth supported his head, and thus they carried him to his bedroom. Another of these convivial tales is somewhat ghastly. On the day of his mother's funeral a number of mourners assembled at Culloden. By an old Scottish custom, which is only now dying out, the party drank freely in the house. Duncan was intrusted with the task of attending to the guests, and did so with such hospitality that when the funeral procession reached the grave it was found that the coffin had been forgotten.

When scenes like these disgraced private society, it need not be said that the revelry of the junior bar was fast and furious; and, according to Burton, Forbes seems, "before he became a Crown lawyer, to have been a prime ringleader among jolly fellows." But this only lasted for a few years. He soon abandoned the dissipations of youth, and devoted himself to public affairs.

The last Parliament of Queen Anne was dissolved on the 5th of January 1715. At the general election John Forbes of Culloden stood for Inverness-shire against Gordon of Invergordon. These were the days of unlimited treating; and Bumper John was skilled in the tactics by which elections were gained. One evening he, his brother Duncan, and some of their supporters, were feasting in one of the county towns. Late at night the candidate proposed that they should drink to the prosperity of the town. "If we drink more we shall be useless," said one of the company. "No," replied Forbes, "unless we drink this health, we shall have done nothing." "Come, then," said one gentleman, holding up his glass, "here's the health of the town; now let's go." "That's not the way!" shouted Forbes, "it may be yours, but it's not mine." He went out to the Town Cross.

A barrel of strong brandy and water was brought, and a crowd assembled. Forbes took a glass, drank to the prosperity of the town, and went off, amidst shouts of applause, leaving the liquor to be finished by the townspeople. He was returned as member for the county on the 24th of February 1715.¹

During the election Duncan Forbes had been a great canvasser. He went round the country, drinking with the freeholders, and charming them with his pleasant manners. His honest face and handsome figure gained him many friends; and he acquired influence which was soon of great value not only to himself but to the country. The Culloden family had always been staunch Whigs. Duncan's grandfather was returned to Parliament for Nairnshire in the reign of Charles the Second, but was unseated for refusing the Test. His father had represented Inverness-shire in the Convention of Estates in 1689. It was, therefore, with deep alarm that he heard rumours of Jacobite plots. "As for your Highland neighbours," his brother wrote to him, "their trysts and meetings, I know not what to say. I wish we be not too secure. I can assure you the Tories here were never higher in their looks or hopes, which they found upon a speedy invasion."²

The events of the short struggle, which was thus foretold, the Braemar gathering, the fights at Preston and Sheriffmuir, the sudden flight of the Pretender, and the complete failure of the Rebellion, are well known.

During the period of danger Duncan Forbes had worked night and day. He went from house to house in his native county, and persuaded many of his friends to support the Government. He pointed out the folly of the Rebellion; he warned, advised, and implored them to beware. His personal influence was great. Had he been a mere lawyer,

¹ Parl. Papers, 1878, lxii. ii. 49.

² John Forbes to Duncan Forbes, London, 30th April 1715, Culloden Papers, No. 48.

the Highland gentlemen would not have listened to him; but he was a man of the world, whom they knew as a friend. He had shared their pleasures and their sports; and now, when he came imploring them not to take arms, they were ready to listen to his words. His services, which were of great value to the Government, were appreciated. When the Pretender's standard was raised in September 1715 he was little known. Six months after, he was on the way to certain promotion; for his activity and talents had attracted the attention of John, Duke of Argyll, and his brother, Lord Islay.

On the 19th of March 1716 he was appointed an Advocate-Depute. "Yesterday," he writes to Sir David Dalrymple, "I was qualified, the Lord knows how, as your Depute." He agreed with the Lord Advocate in his objections to severe measures; and the correspondence between them shows that they regarded the Commission of Oyer and Términer with equal dislike and suspicion. John Forbes warned his brother that it was dangerous to speak of showing mercy to the Highlanders. In London, society was eager for repression and severity. "Divisions run high at Court," the laird of Culloden wrote, "and all our people who make any opposition to the Bill of Forfaultures are ill looked on by the Court; of which number your humble servant is one."¹ But Duncan Forbes was not the man to support measures of which he disapproved in order to gain the favour of Government. The difficulties of his position were increased by the proposal to send prisoners for trial to Carlisle. On this subject he wrote to Lord Islay: "I have since my Lord Advocate's leaving this country officiated for him, faithfully, I hope; and by this night's post I have a kind of intimation made me, as if there were some design of appointing me one of his Deputys for the

¹ John Forbes to Duncan Forbes, 31st May 1716, Culloden Papers.

ensuing prosecutions; but as I am an utter stranger to the English forms of procedure, and for several other reasons which your Lordship will easily apprehend, I am determined to refuse that employment, nor can any motive whatsoever induce me to accept that place, as things now stand, unless your Lordship commands me.”¹ Lord Islay answered by saying: “I had yours about your deputation of advocate. I am very sensible of the disagreeable part of that office at present, and yet I would advise you to struggle through it as well as you can.”² Deputes were specially appointed to conduct the trials at Carlisle, and Forbes was thus relieved of that duty.

He was, nevertheless, so afraid that Ministers would yield to the demand for greater severity, that he took the extraordinary course of writing an anonymous letter to Walpole. “My constant affection,” he began, “for my King and country will not permit me to see the interest of both in danger of being ruined without a deep concern; and when I discover that the mischief proceeds from the drowsy negligence or selfish designs perhaps of some Ministers, I cannot help endeavouring to obviate the misfortune by representing the case to such as ought to profit by the admonition. What moves me to address this unsigned remonstrance to you is, that of a great while I have looked upon Mr. Walpole to be an honest man, and am still very unwilling to part with that belief, notwithstanding of very shrewd appearances to the contrary; however, I shall form my opinion in that matter, as I find this notice is used.” He then pointed out that the Rebellion was utterly crushed; that almost every Whig in Scotland was in favour of a policy of mercy; that there were not two hundred gentlemen in Scotland who were not connected with some of the rebels; and that vindictive measures would tend to alienate many of the most loyal of the King’s

¹ Duncan Forbes to Islay, 7th July 1716, Culloden Papers.

² Hill Burton, *Lives of Lovat and Forbes*, 289.

subjects. He declared that the Forfeiture Bill was a mistake. He expressed his regret that Ministers were not at some pains to find out the feelings of the people of Scotland. "A faithful informer," he said, "must report that the King's friends in Scotland begin to fear that the nation is devoted to destruction." He suggested that the ringleaders of the Rebellion should be executed if they could be found, but that an indemnity should be offered, on certain terms, to all who surrendered themselves within a given time. He concluded by attacking those who were the advisers of Government on Scottish affairs. "It is no small cause of discontent to such as served the King faithfully in this nation, to find that a Ministry can be so designing, or so far imposed on, as to quit with the Duke of Argyll; worthy in himself, but chiefly valuable for his steady adherence to his Majesty; moved by a parcel of fictions, contrived and abetted by certain politicians, who are become a proverb in their country."¹ His last words were: "By what I have said in the onset, sir, you may guess I will not rest satisfied singly with having transmitted this to you. I must know something of your sentiments about it. I'm resolved to wait till the 20th of September; and if in the London Gazette, before that date, I see nothing advertised concerning a letter dated and signed as this is, you may trust to it, I shall complain of it in such a manner, as you shall have no reason to be satisfied.—I am, sir, your humble servant, Y. Z."² The Secretaries of State and Lords of the Treasury were in the habit of answering anonymous letters by putting notices in the London Gazette; but no answer to the letter which Forbes wrote appears in the Gazette from August till October 1716. Walpole probably threw it aside as waste paper. The writer's subsequent career shows that it was a

¹ The Duke of Argyll had been dismissed from office in the summer of 1716.

² Culloden Papers, No. 82. From a copy in the handwriting of Forbes.

genuine love for his country, and a strong conviction that firmness would avail nothing if it did not go hand in hand with fairness, which induced him to address the great Whig statesman in such unusual terms.

As an Advocate-Depute Forbes discouraged prosecutions on account of the Rebellion; and it is doubtful whether any took place at the instance of the Lord Advocate. The Government, however, tried a number of the rebels at Carlisle.¹ Forbes not only refused to appear for the Crown, but collected money among his friends for the support and defence of the prisoners. "It is certainly Christian," he wrote to his brother, "and by no means disloyal, to sustain them in their indigent estate, until they are found guilty. The law has brought them to England to be tried by foreign juries; so far it is well. But no law can hinder a Scotsman to wish that his countrymen, not hitherto condemned, should not be a derision to strangers, or perish for want of necessary defence or sustenance out of their own country. Therefore, if any contribution is carried on for the above purpose with you, it is fit you should give it all the countenance you can, by exhortation and example. The King's best friends do not scruple it here."²

His conduct was unpopular with many Whigs; although some of the most loyal among them contributed to the fund for helping the Carlisle prisoners. He was even accused of being a Jacobite at heart. In old times the Lord Advocate and his Deputies had been eager to enforce the Statutes of a Parliament which was always severe to the people, and usually subservient to the King. That Crown Counsel should not only form an unbiassed opinion on criminal cases, but should even incline to the side of mercy, was a thing hitherto unknown in Scotland. But now Duncan Forbes

¹ *Supra*, p. 307.

² Duncan Forbes to John Forbes, 16th Nov. 1716, Culloden Papers.

laid the foundation of that system of dispassionate inquiry into the facts of each accusation which has, except on a few occasions, been ever since regarded as the first duty of Crown Counsel in Scotland.

At the general election of 1722, Forbes, who in the meantime had acquired a large practice, was invited to stand for the Inverness burghs. He agreed to contest the seat, on the understanding that, if elected, he might attend to his business in Edinburgh, except where it was absolutely necessary that he should be in the House of Commons.¹ The election took place in April. He was opposed by Gordon of Ardoch, and was defeated. But, on a petition, Gordon was unseated, and Forbes was declared to have been duly elected.² His brother, Bumper John, was at the same time returned for Nairnshire. In future Duncan had to make frequent trips to London. "Mr. Duncan Forbes," we are told, "generally made that journey on horseback, summer and winter, as, indeed, almost all the Scotch members did. It is said that John, Duke of Argyll, used to strap up the skirts of his coat round his waist, and dash through on horseback in the worst storms of winter."

In the House of Commons Forbes soon became a favourite. His manner was easy and agreeable. The excesses of his earlier years had been abandoned for a long time; but he was still fond of society, and could, now and then, be a good boon companion. He had none of that social diffidence which oppressed many of the members from Scotland. He never cringed to a great man or was unjust to his inferiors. If he differed from the Ministers, he was perfectly firm. The House soon discovered these qualities, and was always ready to listen to the member for the Inverness burghs.

He had entered Parliament at the right time. The dismissal of Dundas gave the Duke of Argyll, who now became

¹ Culloden Papers, No. 99.

² Parl. Papers, 1878, lxii. ii. 60.

supreme in Scottish affairs, an opportunity of helping his friend ; and Duncan Forbes became Lord Advocate on the 29th of May 1725.

Henceforth his attendance in Parliament was regular. " You can recollect," he wrote some years after, " that since first I had the honour to serve the Crown, I never was one day absent from Parliament. I attended the first and the last and every intermediate day of every session, whatever calls I had from my private affairs to be here."¹

This constant attendance was made absolutely necessary by a change in the management of Scottish affairs, which threw more work on the shoulders of the Lord Advocate. The office of Secretary of State for Scotland was abolished. The arrangements made at the Union had completely failed. Often, during the period between the Union and the appointment of Lord Advocate Forbes, the letters of public men reveal the fact that the office of " Scottish Secretary " was a source of constant difficulty to Ministers, who found themselves embarrassed by the jealousies of rival sects and parties in Scotland. The origin, however, of the change made in 1725 is to be found in the intrigues of the English Court during the two previous years. In 1723 Lord Carteret was one of the Secretaries of State. His talents and character are well known. He had been educated at Westminster and Christ Church ; and his attainments, when he left Oxford, were so great that Swift, it is said, jestingly blamed him for knowing more Greek, Latin, and Philosophy, than became a person of his rank.² Soon after he had taken his seat in the House of Lords he attracted attention by his powers of speaking, by his great industry, and by his knowledge of affairs. He was made a Lord of the Bedchamber on the accession of George the First, and soon became a royal favourite. In addition to his busi-

¹ Forbes to Scrope, 23d Nov. 1734 : Hill Burton, *Lives of Lovat and Forbes*, 340.

² Coxe, *Memoirs of Walpole*, i. 177.

ness talents, he had two qualities which endeared him to the King: he drank heavily, and he spoke German. It was now in his power to have atoned for the errors of a youth which had been far from blameless, by a career of honest public service. But Carteret was ambitious and impatient. Walpole and Townshend became the objects of his jealousy; and he began to intrigue for the purpose of driving them from power. He first gained the Countess of Darlington, and was then able to approach the Opposition leaders, and persuade them that the days of Walpole and Townshend were numbered, for these statesmen had now to fight not only against him, but against the King's mistress.¹

Early in the summer of 1723 the King went to Hanover. Townshend and Carteret went with him; and the intrigues which had begun at St. James's were continued at Herrenhausen. Walpole was left in England. Carteret had powerful friends in the Cabinet; and one of these was the Secretary of State for Scotland. John, fifth Earl of Roxburghe, had been a member of the Scottish Government before the Union. His services in support of the Union had been rewarded with a dukedom. Some years later he was made Keeper of the Privy Seal of Scotland. In 1715 he had served, under the Duke of Argyll, against the Pretender; and at the close of the Rebellion he was appointed Secretary of State for Scotland. He was now, along with Carteret and Cadogan, a dangerous enemy to Walpole. Their intrigues failed. But the conduct of Roxburghe was not forgotten by Walpole, who suspected him of bad faith; and in 1725 his suspicions were confirmed.

In 1713 the Malt Tax was extended to Scotland. It was furiously opposed as a breach of the Treaty of Union. The controversy was the origin of the custom of meetings held by Scottish members to discuss questions affecting Scotland. A whip was issued by Lockhart, and a meeting took place at

¹ Coxe, i. 180.

which the possibility of moving for a dissolution of the Union was considered.¹ In Scotland the feeling was very strong. All taxes were disliked, but the Malt Tax was disliked most of all, and payment was evaded from time to time. The farmers and country gentlemen of England, who themselves detested the Malt Tax, were indignant that it was not levied in Scotland. Their indignation was at its height in the session of 1724. On the 4th of February, when the Commons were going into committee of ways and means, the House was adjourned in order to give Ministers time to find some means of forcing the people of Scotland to pay the Malt Tax. Nothing was, however, done during that session. The country party in England grew more and more dissatisfied. When Parliament met after the recess, a motion was carried that, instead of the Malt Tax, an additional duty of sixpence on every barrel of beer should be payable in Scotland. But in Scotland this was more unpopular than the Malt Tax. Public addresses and private letters were sent by every post to the Scottish members. The heritors of Midlothian wrote to their member, Lord Advocate Dundas, reminding him of the meetings of Scottish members in 1713, and suggesting that similar meetings should be convened. The Scottish members waited upon Walpole; but it is said that he was able to silence them by a personal argument. They were in the habit of receiving ten guineas a week from Government; and, if the revenue of Scotland did not provide this sum, they would be expected to relinquish their pay, and learn to "tie up their stockings with their own garters."² The proposed tax on

¹ Lockhart Papers, i. 419. "In order to bring about this general meeting, I was directed (as representing the shire of Edinburgh, which, in the Scots Parliament, had the precedence of all the other shires and burghs) to write a letter to each of the Scots Commons." In April 1712 the members from Scotland held a meeting at which they adopted a resolution against a proposed change in the paper duties.—Wodrow to Mrs. Wodrow, 30th April 1712.

² Mahon, Hist. Eng. ii. 68 (5th ed.).

beer was, nevertheless, abandoned. But something had to be done. English malt paid a duty of sixpence a bushel; and Scottish malt was now taxed at threepence a bushel. The sum which Government expected to raise by this means was £20,000. But if the tax did not produce that sum, the deficiency was to be made up by a surcharge on the maltsters.

The tax was to be levied on the 23d of June 1725. On that day Edinburgh was quiet. But in Glasgow there were signs of disorder. Groups of idle men gathered in the streets. It was known that an attempt would be made to prevent the collection of the malt duty; and the Excise officers did not venture to do their duty. The day passed without a riot. But Daniel Campbell of Shawfield, member of Parliament for Glasgow, had been warned that an attack would be made on his house. He had supported the Malt Tax, and was even suspected of helping Government to prepare the bill. He left Glasgow, and sent a message to Edinburgh asking for a guard of soldiers. On the evening of the 24th two companies of infantry arrived, and were sent into quarters. That night Campbell's house was attacked and destroyed. Next day there was a fight in the streets between the mob and the troops, in which nine persons were killed and about seventeen wounded.¹

Forbes, who had now been Lord Advocate for about a month, was in Edinburgh at this time. He wrote to the magistrates of Glasgow requesting them to transmit to him an exact account of what had taken place. "I am heartily sorry, gentlemen," he said, "that a subject of this kind should be the first that occasions our correspondence; and that a town so noted as Glasgow for its loyalty to his Majesty, and its adherence to those principles upon which the present happy

¹ Culloden Papers, Nos. 113, 119; M'Ure, *History of Glasgow*, 333-345; Lockhart Papers, ii. 162.

establishment is settled, should be the first, in the whole kingdom, that shakes off obedience to the Government, and that gives joy to the King's enemies by showing a spirit of resistance and opposition to the laws." The Duke of Roxburghe, Secretary of State for Scotland, was in London. Dundas, the late Lord Advocate, was doing all in his power to embarrass the Government in Scotland. The whole responsibility of dealing with the crisis was thus thrown upon Forbes and General Wade, who was in command of the royal troops in Scotland. Wade sent an express to the Duke of Newcastle, and the Lord Advocate enclosed a letter to Scrope, asking for instructions.¹ On the 1st of July a despatch was sent from Whitehall to the Lord Advocate and Solicitor-General, directing them to make a strict inquiry into the Glasgow riot. The orders were, "That you employ your utmost care and endeavour in bringing the offenders to justice, and in causing such of them to be seized as you shall judge convenient." They were also directed to inquire into the conduct of the magistrates, and especially of the Provost, against whom they were authorised to proceed by "securing, examining, and committing him according to law."

On receiving these instructions, Forbes wrote to London: "I am resolved to go forthwith to Glasgow, and to do what in me lies for discovering thoroughly, and bringing speedily to justice, the offenders." He had taken precautions to obtain information. "I have," he says, "taken all the previous care I could of that matter. I have sent before, secretly, two young fellows from hence, who are acquainted pretty well with the townspeople, and who, under pretence of other business, are to pick up all the private information they can, to the end that I may follow it out when I go thither with a regular inquiry." He mentions that the Solicitor-General was willing to go to Glasgow, but that

¹ Scot. MSS. Record Office.

it was thought his presence in Edinburgh might be of service, should any sudden emergency arise. So he had given him "a deputation to act for me in my absence, pursuant to the powers contained in my commission." His letter ends thus: "This moment I am setting out with the General for that place: he shows a great deal of spirit and vigilance on this occasion."¹

Wade had ordered his dragoons to take their horses in from grass. A regiment of foot, an independent company of Highlanders, and a battery of artillery were put in marching order. At the head of this force the Lord Advocate and General Wade rode into Glasgow, where the troops were lodged in barracks. On Saturday, the 10th of July, Forbes began an examination of witnesses, which continued till Thursday, the 15th. A number of persons were brought before him. He examined them on oath, and, according to Wodrow, "acted in a very sovereign, arbitrary way."² He twice summoned the magistrates, and cross-questioned them at great length. The opinion which he formed was that they had been guilty of a gross neglect of duty; and he issued warrants for the apprehension of the Provost and six magistrates. This he did in virtue of his office of Lord Advocate. The warrants bore that he was not only Lord Advocate, but also "one of the justices of peace for the shire of Lanark." But it was as Lord Advocate that he claimed the right to commit the magistrates.

The Provost and magistrates were taken to Edinburgh under an escort of cavalry. In the Court of Justiciary, Dundas, the late Advocate, appeared for them, and demanded that they should be admitted to bail. He maintained that

¹ Lord Advocate to Delafaye, 8th July 1725, Scot. MSS. Record Office; Culloden Papers, No. 113.

² *Analecta*, iii. 216. "The advocate," Wodrow says, "gave great offence by his open, profane cursing and swearing at Glasgow, and his taking the right hand of the General, and talking in time of sermon, when in the afternoon in the church, and mocking Major Gardiner for his strictness."

before the Union the Lord Advocate might have had the power of imprisonment, but that now he had none. He was, Dundas pleaded, merely a servant; and if Lord Advocate Forbes was a justice of the peace for Lanarkshire, that gave him no right to grant warrants for the apprehension of the magistrates of Glasgow. The fact was, that ever since the Union the Lord Advocates had claimed the right of granting warrants to arrest.¹ Nevertheless, the judges released the magistrates on bail. The question when they should be tried was left to Forbes.² But he did not think it necessary to molest them further. Some of the Glasgow mob were brought to trial, and sentenced to be whipped by the common hangman and transported to the Colonies.

The vigorous measures of Forbes had put an end to the disturbances in Glasgow; but he had now to deal with Edinburgh. There the opposition to the malt duty took a different form. The brewers combined to stop brewing until the duty was abolished. This was a serious matter; for the consumption of ale in Edinburgh was about two thousand five hundred barrels a week.³ The citizens would, therefore, suffer great inconvenience from the action of the brewers. The Lord Advocate received a deputation of brewers, and informed them that they were acting under very bad advice in resisting the Government. He tried to induce them to submit. They requested time to consider their position. Their adviser was Dundas, in whom they had great confidence. He advised them to hold out; and his advice was taken.⁴

¹ A prominent instance of this was the warrant, granted by Sir James Stewart, on 3d October 1712, for the apprehension of the notorious Rob Roy. Hist. MSS. Commission, Third Report, App. 381.

² Delafaye to Forbes, 10th Aug. 1725, Scot. MSS. Record Office.

³ Walpole to Townshend, 3d Sept. 1725, Coxe, ii. 465.

⁴ "So strong is the enchantment with which he (Dundas) holds them, that it is impossible to persuade them that they are in any sort of danger, or that they are making it impossible for their friends to help them." Campbell to Walpole, 31st July 1725, Coxe, ii. 441.

The Lord Advocate called in the aid of the Court of Session. The judges had, from time immemorial, superintended various matters relating to the sale of provisions in Edinburgh. Forbes now begged them to interfere for the purpose of compelling the brewers to supply the city with ale. He held that victuallers "are in a particular manner under the oversight, direction, and management of the Government of any country more than those of any other trade or employment," and declared that it was absolutely necessary that the Court should put an end to the brewers' combination. In his memorial to the judges he stated that, in consequence of this combination, the city would, in five or six days, be in "a state of utter want of beer and ale, and also of bread, to the working whereof barm or yest from new ale is necessary." The President of the Court was Sir Hugh Dalrymple of North Berwick. He was anxious to please Walpole, through whose influence he hoped to be allowed to resign on a rich pension; and under his advice an Act of Sederunt was passed on the 29th July. It was declared to be illegal for brewers, "or others whose employment is to provide necessary sustenance for the people," to stop work suddenly. The brewers were ordered to continue brewing enough to supply their customers till the 1st of November, and were also summoned to appear in Court next day, and find security that they would obey the Act of Sederunt.

That evening the brewers had a consultation with Dundas, who advised them to set the judges at defiance, and prepared a petition against the Act of Sederunt. Accordingly, on the following morning, the brewers did not appear in Court. But their petition was presented. The judges declared that it was false, scandalous, and seditious; that it was founded on principles which tended to the overthrow of all law; that it was a contempt

of Court; that it must be burned by the common hangman; that no one must be allowed to possess a copy, except the Lord Advocate; and that all the brewers who did not submit, on or before the 10th of August, should be imprisoned. This was on the 31st of July, on which day the Court rose for the summer recess.¹

In the meantime Government was watching the course of events in Scotland. "Although," Walpole writes to Townshend, who was on the Continent, "the affairs of Scotland are now the chief object of men's thoughts and conversations, I have not as yet troubled your Lordship with my thoughts on the subject, till I am able to form a better judgment about them, and to give my humble opinion to his Majesty upon mature deliberation, and shall only say at present, that I am far from thinking that the troubles there are over. On the contrary, I greatly apprehend it will come to be a serious matter, and prove as difficult a task as anything that has happened since his Majesty's accession."²

Walpole strongly suspected that the Duke of Roxburghe was the cause of the troubles in Scotland. At that time the post of Irish Secretary was spoken of as a place in which "a man had business enough to hinder him from falling asleep, and not so much as to keep him awake." But the post of Scottish Secretary resembled, in its grave responsibilities, the Irish Secretaryship of our own day. Scotland was then a thorn in the side of England. Masses of the people were discontented, turbulent, poverty-stricken, and treacherous.

¹ Acts Sed. 29th to 31st July 1725; Coxe, ii. 442. Copy of a letter from a Gentleman in Edinburgh, to his Friend in the Country, upon the subject of the Malt Tax, 1725, Pamphlets, Adv. Lib. 206. (This pamphlet, signed "Philo-Scotus," is said to have been written by Forbes.) A letter from the Government, thanking the judges for their zeal, was received by the Lord President during the recess, and read in public at the meeting of the Court in November. But, in the following year, when Lord President Dalrymple requested leave to resign on a pension, Walpole informed him that his services could not be spared. "This," says Wodrow, "is being kicked up stairs."

² Walpole to Townshend, 29th July 1725.
9th Aug.

It was therefore in the power of the Secretary of State, by merely neglecting his duties, to embarrass the King's Ministers. Roxburghe did more. He encouraged Dundas in supporting the opposition to the Malt Tax. It was his duty, as Secretary of State, to transmit the orders of Government to Scotland. He either delayed or counteracted them.¹ He kept alive the spirit of disaffection by spreading rumours that the fall of Walpole was at hand. He allowed Dundas to whisper, "Roxburghe has the King's ear." Walpole's shrewdness told him what was going on. He suspected that the Lord Advocate of the late Government was acting in concert with a member of his own Cabinet. His suspicions were confirmed by Baron Lant, who, returning from Scotland, told him that the King's friends in that country knew that the Secretary of State was at the root of all the mischief. "He² explains himself for a total abolition of the office," Walpole informed Townshend.³

In Scotland matters did not improve. In many counties new commissions of the peace were issued, consisting of persons on whom Government could rely. The Judges, the Lord Advocate, and the Solicitor-General were appointed justices of the peace *ex officio*. The excisemen had to be protected by soldiers; the brewers still held out; and Walpole decided that Roxburghe must be dismissed. "His Majesty," he writes, "can only determine, but I beg leave to observe, that the present administration is the first that was ever yet known to be answerable for the whole Government, with a Secretary of State, for one part of the kingdom, who they are assured acts counter to all their measures, or at least whom they cannot, in the least, confide in."⁴ In consequence of Walpole's representations an express was sent from

¹ Coxe, i. 234.

² Lant.

³ Walpole to Townshend, $\frac{13}{4}$ th Aug. 1725. The Court was at Hanover, where Lord Townshend was in attendance on the King.

⁴ Walpole to Townshend, $\frac{17}{8}$ th Aug. 1725.

Hanover, with the King's orders to the Duke of Roxburghe to deliver up the seals of office to the Duke of Newcastle.

Lord Islay, at this time Keeper of the Privy Seal of Scotland, was in Edinburgh, having been requested to go to Scotland and support the Government. As soon as Walpole knew that the King had consented to the dismissal of Roxburghe, he wrote to inform Islay of the fact. Roxburghe was now powerless, and Dundas was baffled. The brewers made one more struggle. They petitioned that no further steps should be taken till Parliament met, and that those of their number who were in prison for refusing to find the security ordered by the Court of Session should be liberated. Islay, attended by the magistrates of the city, addressed them in strong terms, distinctly refusing to grant the prayer of their petition. A meeting of brewers was held, at which some were for further resistance. But the majority saw that all hopes of success were vain; and within three days fifty brew-houses were hard at work in Edinburgh and Leith.¹

In telling Islay of the dismissal of Roxburghe, Walpole had said, "It may not be improper to acquaint you at present, that the scheme is to put an end to the office of Scotch Secretary." The public journals assumed that Islay would become Secretary of State for Scotland.² But the office was abolished. This fact was communicated to the Lord Advocate in the following letter from the Duke of Newcastle:—"His Majesty, not intending for the future to have any particular Secretary of State for Scotland, has been pleased to remove the Duke of Roxburghe from that employment, and ordered his other Secretaries of State to take care of the department that his Grace had. As, in my Lord Townshend's absence, that must lie singly upon me, I must beg your Lordship will be pleased to send me from time to time such

¹ Walpole to Townshend, 3d Sept. 1725.

² Caledonian Mercury, 31st Aug. to 6th Sept. 1725.

accounts as you shall judge to be for his Majesty's service. It is a very great pleasure to me, that, in the execution of the King's commands, I shall have the honour of your Lordship's correspondence, and the happiness of your assistance; which will be the most necessary to me, who must be unacquainted with the laws and methods of proceeding in your country."¹ Forbes answered the Duke in a letter which expresses his approval of the change in the management of Scottish business:—"I have received," he wrote, "the letter which your Grace did me the honour to write to me, of the 24th, and with it a great deal of joy, to find that this part of the United Kingdom is no longer to be governed by a distinct Ministry; but that our affairs are to be managed by the very same persons who conduct the public affairs of England, so much to their own honour, and to the general satisfaction of the people. From henceforward, we flatter ourselves, all faction and contention betwixt his Majesty's faithful subjects, in this country, will cease. Your Grace's disinterestedness will soon put an end to all party views and projects, and your discerning will speedily convince all those who would make their way to the royal favour that they can come at it in no other road, but that of real merit, and attachment to his Majesty's interest. As to the difficulty which may lie in your Lordship's way, in executing the charge of Secretary of State for this country, from the particularity of the laws, and Constitution here, it is what your Grace's application and great abilities will, in a very small time, get the better of." He then promises to give all the assistance he can to the Secretary of State, and thus concludes: "Neither can I conceal it from your Grace that the putting the administration of the public affairs of Scotland in the hands in which it is now lodged, will very much contribute to the reducing this country to reason; because the people cannot expect

¹ Newcastle to Lord Advocate, 24th Aug. 1725, Culloden Papers, No. 121.

from your Grace any partiality in their favour, which perhaps they vainly flattered themselves with as matters stood.”¹

In another letter, written about this time, Forbes says that he is much pleased with the abolition of the office of Secretary of State for Scotland. “It yields a prospect,” he writes, “that for some time at least we shall not be troubled with that nuisance, which we long have complained of, a Scots Secretary, either at full length or in miniature. If any one Scotsman has absolute power, we are in the same slavery as ever, whether that person be a fair man or a black man, a peer or a commoner, six foot or five foot high, and the dependance of his country will be on that man, and not on those that made him.”²

Thus the office of Secretary of State for Scotland was abolished. The new arrangement was that the two principal Secretaries should be responsible for the whole of Great Britain. But they had a confidential adviser on Scottish affairs in the person of Lord Islay. Archibald Campbell, Earl of Islay, was well suited by position and training for the management of Scottish affairs. He was the brother, and afterwards the successor, of John, Duke of Argyll. In early life he had been a student at a Scottish University, from which he had gone to study law at Utrecht. He then entered the army, but, after a short period of military service, resigned his commission, and devoted himself to politics. He was Lord High Treasurer of Scotland before the Union. He was one of the Commissioners on Union; and, after that event, he was one of the sixteen representative peers. He had been a judge of the Court of Session, Justice-General of Scotland, Lord Clerk Register, and Keeper of the Privy Seal. In these offices he had gained a thorough knowledge

¹ Lord Advocate to Newcastle, 31st Aug. 1725, Scot. MSS. Record Office. This letter is not among the Culloden Papers; but the Duke of Newcastle's answer, dated 9th Sept., is No. 126 of that collection.

² Burton, *Lives of Lovat and Forbes*, 333.

of affairs. "In his study of the law," we are told, "he had acquired acuteness of apprehension and method of arrangement."¹ In consequence of this combination of high position and rare qualifications Islay was, although the office of Scottish Secretary was abolished, the manager of all the affairs of Scotland. He was nicknamed "King of Scotland."

The position of the Lord Advocate was this: At first he was not entirely in the confidence of Islay and Walpole. But the zeal which he displayed, and the valuable assistance which he gave to Islay, made his help necessary; and he was soon trusted with every State secret. It was not intended that the control of political business should fall into the hands of the Lord Advocate. He was to be the legal adviser of the Government. But Forbes was a man of great talent, and the personal friend of Islay; and thus he had more power than another Advocate might have been able to acquire. That he should take charge of purely political as well as legal business seemed natural to the people of Scotland; for the Lord Advocate had always been, when Scotland had a Government of her own, something more than a Crown lawyer. Thus the personal character of Forbes, his friendship with Islay, and the traditions of his office, began the system by which, in course of time, the Lord Advocate became the manager of Scottish affairs.

Forbes made good use of the power and influence which he enjoyed through the friendship of Islay. He did much to encourage trade and manufactures, in which Scotland made great advances during the years between 1725 and 1735. But the Highlands were a constant source of danger. The regions beyond the "Highland Line" were less known and less frequented by Englishmen than the Rocky Mountains of America now are. There were no towns or villages of importance. The ground was uncultivated, and the people

¹ Coxe, i. 235.

were half savage. Every county swarmed with robbers, whose depredations the Government was unable to prevent. In some places it was found necessary to establish "Watches" for the purpose of protecting property. Thus, in April 1723, the heritors of Ross-shire met to discuss a scheme for raising a "Highland Watch," consisting of thirty men and three overseers. Each man was to have £2 a year "for wages, shoes, and clothes," and six bolls of meal, and each overseer £20 a year. Each tenant was to be taxed two shillings a year; "And it's not doubted that all the tenants in the country will voluntarily agree to such a small thing, to be sure of their cattle all the year over, being, by the thieves turning so very insolent, in as great danger at home as in the hills."¹

Forbes saw that the first duty of a Scottish statesman was to break up the clan system, to disarm the Highlanders, and to destroy, as far as possible, the distinctive features of the Highlands. In doing so he had the assistance of General Wade. At a later period George the Second used to complain that Wade "had always black atoms before his eyes," and was not to be trusted. But he did the King good service in Scotland.

In 1724 Lovat had presented to Government a memorial on the state of the Highlands. Wade was commissioned to inquire whether the statements of Lovat were well founded, to report in what respects previous remedies had been ineffectual, to consider whether independent companies should be enrolled, and to give advice on various other matters.² Having completed the investigations which he was directed to make, Wade presented to the Government a report, and made a number of suggestions, which received effect in a bill prepared by Forbes, and passed in the session of 1725.³

¹ Chalmers MSS., Advocates' Library, 35. 6. 4.

² Private Instructions to General Wade, 17²³/₂₄, Scot. MSS. Record Office.

³ 11 Geo. I. cap. 26. "Not so much as one Scotsman had the honestie and

As soon as the Malt Tax riots were at an end, Wade started for the north. He arrived at Inverness on the 10th of August. Few of those who now reach Inverness, after an easy journey through the beautiful scenery of the Highland Railway, think of what the district between Perth and Inverness was when General Wade and Lord Advocate Forbes began the task of bringing it under order. Instead of the comfortable hotels of Birnam, Pitlochry, or Blair-Athole, there was not a single good inn upon the line of march. Instead of a population of harmless people, engaged in agriculture, or ready to assist the stranger in his amusements, there were ignorant savages, willing to use their hidden arms in committing any crime at the bidding of their masters. The whole country was covered with a network of soldiers, and every pass was guarded. The force at the disposal of Government was sufficient to keep the country in awe. But there were no roads along which the troops could move from place to place. To make roads was to pave the way for the civilisation of the Highlands. Five hundred men, drawn from the regiments of the regular army and the Highland companies, were set to work. Engineers, one of whom was Burt, author of the well-known "Letters from the North," were sent down from England; and, in twelve years, two hundred and fifty miles of roads were made. The main road ran from Perth to Inverness, by Dunkeld and Blair-Athole. Another road passed north from Stirling, through Crieff and Glenalmond, till it joined the main road at Dalnacardoch. A third road connected Inverness with Fort-William, and a fourth ran from Fort-Augustus southwards to the main road between Perth and Inverness. The work

courage to appear in behalf of their oppressed countrymen: nay the bill was brought in by Duncan Forbes (for which and other meritorious jobs he was soon after made Lord Advocat) and supported by the Duke of Argyle and all his dependants, so it passed both Houses, and was made a law." Lockhart Papers, ii. 159.

of making these highways, through mountain fastnesses, was rough, and even dangerous.¹ Wade was forced to endure many hardships. He often lived for weeks at a time in huts built among the mountains, where he was visited, from time to time, by Forbes, who inspected the progress of the work, and sent reports to the Government in London.²

In the spring of 1734 it was known that a general election was at hand. The opposition to Walpole had grown keener than ever, and a great party fight was anticipated. In Scotland, from time immemorial, the active pursuit of politics had been thought compatible with the performance of judicial functions. But now the ambition of a Scottish judge put an end to this. That judge was the well-known James Erskine of Grange. He was called to the bar in July 1705; and, through the influence of Lord Mar, at that time Secretary of State for Scotland, he became a judge in October 1706. For many years his life was one long intrigue, carried on under the cloak of austere piety. To Walpole he bore a bitter hatred; and he now wished to enter Parliament, and join the Opposition. About three years before, the Government had revived, in a modified form, the office of Scottish Secretary, and had appointed the Earl of Selkirk to the post. Erskine's aim was to become Secretary; and he had sufficient interest to make his election for some constituency almost certain. Walpole determined to checkmate him. A bill dealing with elections was before Parliament. Islay and the Lord Advocate were requested to prepare a clause which would render the return of a Scottish judge to the House of

¹ Among the Scot. MSS. (1725-1729) in the Record Office is a list of working tools required for road-making in the Highlands, a note appended to which says, "The work is generally very heavy, and requires tools of a proportionable strength, which those that were delivered out of the stores were not, being for the most part weak, decayed, and unfit for such service."

² Culloden Papers; Scot. MSS. 1725-1735. "Since I left Edinr., I visited Mr. Wade and his works in the Highlands. He goes on with his usual diligence and discretion, and cannot fail of doing immense service to the King and to this country." Lord Advocate to Sir Robert Walpole, Perth, 11th Aug. 1730.

Commons illegal. The clause was prepared and suddenly introduced. It was perfectly well known that it was aimed at Erskine of Grange.¹ In the Court of Session the fifteen judges sat together as one Court, and the absence of any one of their number on Parliamentary duty tended, it was argued, to impair the efficiency of the bench. On the other hand, the opponents of the clause maintained that it was a great disadvantage to Scotland that her only legal representative in Parliament was often the Lord Advocate, who could not act independently of Ministers.

Erskine, who had received a hint of what was intended, was furious when he heard that a clause which would disqualify him had been introduced. "I will not be trampled on by him, Lord Islay, and his dogs," he declared; "I can at least return to the bar."² He prepared, and sent up to London, a memorial of suggestions against the Elections Bill. "Their making," he said, "an Act of Parliament against me in particular (for it is no other in reality) is as ridiculous as to bring bombs and cannon to batter down a silly cottage."³ For some time it was thought that the whole bill would be abandoned. The Speaker had declared against the new clause; and the Government was said to be only half in earnest on the subject. But, ultimately, the bill was passed and became law.⁴ The old race of political judges was thus at an end, and another of the distinctive features of Scottish public life had disappeared. Erskine resigned his seat on the bench, returned to the bar, after having been a judge for twenty-eight years, and was elected for Clackmannanshire on the 30th of May 1734.⁵

¹ Stair to Erskine, 2d March 1734, Stair MSS. The correspondence preserved at Oxenford, which Lord Stair has kindly allowed me to examine, proves that a canvass for Erskine had been going on for some time, and for various seats.

² Erskine to Marchmont, 9th March 1734, Marchmont Papers, ii. 18.

³ Erskine to Stair, 25th Feb. 1734, Stair MSS.

⁴ 7 Geo. II. cap. 16.

⁵ Parl. Papers, 1878, lxii. ii. 83. Parliament had been dissolved on the 17th of April.

The general election had gone in favour of Government ; but the Opposition was to be the most vigorous which Walpole had ever faced. The leaders calculated that two hundred and forty-eight members would vote against Ministers. A contest on the election of the Speaker was spoken of, not in the hope of defeating the Government, but in order to bring all the Opposition members up to town early in the session. Ministers were accused of weakness in their foreign policy ; and they were to be attacked for the way in which Scottish business was managed. Carteret and Chesterfield laid their heads together, and concocted a scheme for inducing the members from Scotland to impeach Islay for corrupt practices in the election of the sixteen representative peers.¹ In Scotland the Government was strong. The Lord Advocate had been again elected for the Inverness burghs ; and, from the whole country, only eleven Opposition members were returned. But it was now hoped that the Scottish members, who had pledged themselves to support Walpole, might be induced to desert him. "I am sure," wrote Sarah, Duchess of Marlborough, to Lord Stair, "I would do it, if I were in their place, for 'tis an old saying that to deceive the Deceiver is no sin."

On the 13th of June Parliament met. It was at once prorogued ; and the new Parliament did not assemble for business till the 14th of January 1735. The project of dividing the House of Commons on the question of the Speakership was abandoned by the Opposition, and Onslow was unanimously re-elected.

In the House of Lords the Opposition attacked the way in which the election of the Scottish representative peers had been managed. Before the dissolution of Parliament the Marquis of Tweeddale had moved that the election of the peers from Scotland should be by ballot.

¹ Chesterfield to Stair, 15th June 1734, Stair MSS.

But this motion, which involved a breach of the Statutes under which the election took place, was defeated. The Duke of Bedford had then asked the Lords to pass a resolution, declaring that to use undue influence at the election of the Scottish peers was an insult to the Crown, an encroachment on the freedom of elections, and an injury to the honour of the peerage. The Government objected to this resolution, which was lost by a large majority.¹ After the dissolution, all Scotland watched the election of the representative peers, which caused more excitement than any other episode of the general election.

Soon after the Union it had become the custom of Government to prepare a list of sixteen peers, which, known as "The King's List," was circulated among the peers.² All possible means were taken to secure the election of the peers named in this list. At the general election of 1734 this was done as usual; but it was said that the Government officials had been even more than ordinarily unscrupulous in the means by which they had obtained votes. On the day of election a riot was apprehended, and a regiment of infantry was drawn up in the courtyard of Holyrood Palace. This increased the anger of the Opposition peers, who protested that an attempt was being made to intimidate them by military force. Two lists were laid before the assembled peers. The King's List contained the names of the Dukes of Athole and Buccleuch, the Marquis of Lothian, the Earls of Crawford, Sutherland, Morton, Loudoun, Findlater, Selkirk, Balcarres, Dunmore, Orkney, Portmore, Hopetoun, and Islay, and Lord Cathcart. The Opposition candidates were the Dukes of Hamilton, Montrose, Queensberry, and Roxburghe, the Marquis of Tweeddale, the Earls of Stair, Marchmont, Rothes, Haddington,

¹ Parl. Hist. ix. 510.

² The practice of sending down a Government list of peers was continued until the Whig Ministry of 1830 came in.

Caithness, Buchan, Aberdeen, Dundonald, Strathmore, and Glasgow, and Lord Elphinstone.¹ The Ministerial candidates were all chosen, amidst protests from the minority and angry threats that the conduct of the King's servants would be exposed in Parliament.

It was on the 4th of June 1734 that this election took place. Months after, when Parliament assembled for business, the feeling was as bitter as ever. A petition was presented to the House of Lords, by the Duke of Bedford, on behalf of a number of Scottish peers, declaring that illegal methods had been used at the election. "The eyes of all England," says Tindal, "and, indeed, of great part of Europe, were now fixed upon the proceedings of the House of Peers with regard to the election of the Scotch peers." The petitioners were ordered to lay before the House instances of the alleged malpractices, together with the names of the guilty parties.² They thereupon alleged that peers had been requested to vote, without the power of making alterations, for a list framed by persons in high office; that pensions and places had been promised in return for votes; that bribes of money had been given; that offices and releases of debts owing to the Crown had been granted to peers and their kinsmen, as rewards for supporting the Ministry; and that troops had been drawn up at Holyrood for the purpose of overawing those who were taking part in the election.³ Such were the charges brought forward by the Opposition. But no names were given; and the Government, seizing upon this fact, succeeded in carrying a resolution that the order of the House had not been obeyed. The petition was rejected, and a curious chapter in the constitutional history of Scotland was closed.

In the meantime the question of the peers' election had given rise to a scene among the Scottish members of the

¹ Parl. Hist. ix. 609.

² *Ibid.* 720-757.

³ *Ibid.* 759.

House of Commons, in which the Lord Advocate, Dundas, and Erskine of Grange had taken a prominent part. On the day after that on which the Duke of Bedford had presented his petition to the House of Lords the Commons were in Committee of Supply. The number of the land forces was under discussion; and a proposal by Government that the army should be increased was opposed. In the course of the debate Dundas spoke, and alluded to the troops which had been drawn up at Holyrood during the election of peers. He said this was an example of the bad purposes for which the standing army was employed. The Lord Advocate answered him, and declared that it was impossible to govern Scotland except with the help of an armed force; "without which," he said, "the notorious inclination there to smuggling, and cheating the revenue, and to meeting and resisting the execution of legal process, could not be quelled." The moment he sat down Erskine rose to speak for the first time since he had sacrificed his place on the bench in order to gain a seat in the House of Commons. He said he was sorry that the Lord Advocate, "a gentleman whom I regard so much, and to whose worth and learning I am not a stranger," should have spoken as he did about the use of troops in Scotland. He asserted that the execution of legal process had, in that country, free course without the assistance of troops. "There are," he said, "more instances of meeting and tumult in England than in Scotland, and more running of goods in a few days on the Thames than in all Scotland for a year." He attacked the use which had been made of troops at the peers' election, and ended by saying, "For my part, I know no good the army has done in Britain but making roads through the mountains of the Scots Highlands, which was performed by a handful."

The member for Huntingdon, Colonel Handasyde, was

in command of the regiment to which Erskine had alluded ; and he asked if the member for Clackmannan and Kinross meant to reflect on his conduct. Erskine rose to reply, but was interrupted by Sir James Campbell, the member for Stirlingshire, who said that the Rebellion of 1715 had proved the need for troops in Scotland, and taunted Erskine with being brother to the Jacobite Earl of Mar. This was hailed with shouts of "Order !" Erskine rose, and hinted, with a sneer, that Campbell had said nothing worth answering. Campbell sprang to his feet ; but the House would not hear him, and Erskine continued. He first explained that he had not meant to throw any blame on Colonel Handasyde, and then answered Campbell in an adroit speech. He had, he said, always been loyal to the reigning family. "If now my greatest enemies can bring an instance to the contrary, I consent to have it said that I have always been a traitor. If the occasion of this attack on me, and the air with which it was made, had not looked so unfavourably, I must, in justice to the gentleman who spoke, have thought he intended to do me honour, by showing my loyalty to have been so unconquerable that my nearest relations could not shake or diminish it."¹ On this question, as on others, Walpole had a majority ; and the hopes which the Opposition had entertained at the time of the general election were disappointed.

The last event of importance which took place while Duncan Forbes was Lord Advocate was the Porteous Mob. The charge on which Porteous had been tried was twofold : first, causing a body of soldiers, under his command, to fire upon the crowd which had assembled to witness the execution of the smuggler Wilson ; and secondly, firing with his own hand. It was on the 20th of July 1736 that sentence of death was pronounced, and the execution was fixed for the

¹ Parl. Hist. ix. 824.

8th of September. The petition which Porteous himself addressed to the Queen might have been disregarded. But the condemned man had powerful friends. Some persons of rank prepared an "Application" to her Majesty, praying that the sentence of death might be changed into one of banishment for life. Private influence was brought to bear upon Ministers, who agreed to support the Application, when it was presented to Caroline, on condition that the Opposition, as well as the supporters of Government, should join in the appeal for mercy.¹ This condition, which was kept a secret at the time, was caused by the fear of the Government that the Opposition might, in Scotland, make political capital out of the reprieve of Porteous, which, it was well known, would be highly unpopular. Doubts were thrown upon the evidence which had been given at the trial. One trustworthy person, who had been present at the execution of Wilson, declared positively that he had seen the man whom Porteous was said to have killed fall dead before Porteous fired.² Those who wished to save Porteous used every means to secure the signatures of persons of position and influence to the Application. It was soon presented to the Queen, signed by the Duke of Buccleuch, and several other noblemen.³ Porteous was respited for six weeks; but, on the 7th of September, the well-known incident of the "Porteous Mob" took place, and the unhappy man was murdered by the populace.

When the news reached London instructions were sent to the Lord Advocate and Solicitor-General, directing them to make a thorough investigation, and if possible to discover and convict the authors of the tragedy.⁴ It was the summer

¹ Graham to Murray, 15th Aug. 1736, Stair MSS.

² Lord Dunmore to Stair, 18th Aug. 1736, Stair MSS.

³ Whitford to Stair, 19th Aug. 1736, Stair MSS.

⁴ Duke of Newcastle to Lord Advocate and Solicitor-General, 17th Sept. 1736, Scot. MSS. Record Office.

vacation ; and both Forbes and Charles Erskine, the Solicitor-General, were out of town. The Solicitor was the first to return, and he at once commenced an inquiry, which was continued for some time after Forbes arrived from the north.

The examination of witnesses was conducted by the Lord Advocate and Solicitor-General in person. They sat for three hours every morning for the purpose. The inquiry was long and difficult. Suspected persons were examined and cross-examined. Of those to whom questions were put, some were afraid, and others were unwilling, to speak out. The men who had hanged Porteous had sympathisers in every class of the community. Once, at the request of Islay, one of the King's chaplains, in giving the Communion, warned impenitent sinners, and especially the murderers of Porteous. About a hundred of the congregation rose and left the church. As a rule, the clergy refused to read a proclamation against the murder ; and one minister even went so far as to hint that he approved of what had been done.¹ The efforts of Forbes and Erskine were in vain. Several persons who had been arrested were released for want of evidence. Only two trials took place, and in both cases the accused were acquitted.²

When Parliament assembled, on the 1st of February 1737, the King's speech alluded in general terms to "outrages" which had taken place ; but Edinburgh was not mentioned by name. Before long, however, the famous Bill

¹ MS. "Memorial concerning the Murder of Captain Porteous," Record Office. The documents in the Record Office contain a great deal of valuable information with regard to the Porteous Mob. Most of the papers which were laid before Government have been preserved. Some of the letters are very interesting. The original petition, signed by Porteous, is there ; also the petition in his favour, which is signed by about fifty persons of good position (Buccleuch, Morton, Home, Balcarres, Primrose, Moray, etc.). The Lord Justice-Clerk (Andrew Fletcher of Milton) gives, in his letters, various accounts of the Mob. Their watch-cry, he mentions, on the night of the murder was "Hanover." Only those of "the meanest sort" are, he says, against a respite to Porteous.

² State Trials, xvii. 993-1004.

of Pains and Penalties against the city and the Lord Provost was brought into the House of Lords. It disabled Provost Wilson from holding any office, and condemned him to imprisonment; it abolished the town guard; and it took away one of the gates. In this form it passed the Lords, and was sent down to the Commons in the middle of May.¹ In the Lower House even the first reading was opposed by all the Scottish, and many of the English, members. Although it was a Government measure, both the Lord Advocate and the Solicitor-General for Scotland spoke and voted against it. The bill was before the House during May and June, and was resisted in every possible way. It was on the motion to go into committee that Forbes spoke at greatest length. The Attorney-General and Solicitor-General for England had just spoken in support of the motion, and the Lord Advocate followed them. He vehemently attacked the measure; and concluded his argument with these words: "Thus, sir, I have given my opinion with respect to the insufficiency of the evidence for passing the present bill into a law, and I have done it in the sincerity of my heart; for what motive can I have, in what I have spoken, but the discharge of my duty as a member of this House? It is more than probable, sir, that I shall never trouble you again with my sentiments upon this or any other subject, but my conscience would ever afterwards have accused me if I had quitted my seat here before I had given my reasons why I think the present bill should not be committed." The House went into Committee. But Walpole, fearing to offend the members from Scotland, accepted amendments which reduced the bill to a measure disabling the Lord Provost, and imposing a fine upon the city. The bill, thus altered, was nearly lost on the motion to report it. The numbers were equal, and the question was only decided by

¹ Commons' Journals, 16th May 1737.

the casting vote of the Chairman of Committees.¹ The Commons' amendments were accepted by the House of Lords, and the measure received the Royal assent on the last day of the session.²

Although the Act, as it passed, was less severe than the Government had originally intended it to be, it caused great bitterness in Scotland. Incidents which had taken place in Parliament helped to increase this feeling. When English judges were summoned to give evidence in the House of Lords, they sat on the woolsack, or at least came to the table. During the recent debates Scottish judges had been made to stand at the bar. This was deeply resented as an insult to Scotland. Erskine of Grange, and Charles Erskine, the Solicitor-General for Scotland, were pleading in an appeal case before Lord Hardwicke when the motion to report the bill was carried by the casting vote of the Chairman of Committees. It was believed in Scotland that the Lord Chancellor, who had supported the bill in the House of Lords, had purposely detained them in his Court, and that by means of this trick the motion had been carried. The part, therefore, which the Lord Advocate had taken in the debates made him more popular than ever. His popularity was already great. One who had visited Edinburgh two years before, thus describes the way in which Forbes was received in the Parliament House: "'Twas about the beginning of June 1735 that I had the first view of him in his grandeur, having only seen him once at Nairn before. As he came into the Parliament House, the lords saluted him, the advocates at the bar soon followed their example, and afterwards came singly to him, taking a particular pride in paying him their compliments." These feelings of admiration were increased when it was heard how boldly he had opposed the bill

¹ Parl. Hist. x. 318.

² Commons' Journals, 21st June 1737; 10 Geo. II. cap. 34.

against Edinburgh, even although it was a Government measure.

In his great speech in the Commons he had said that he might never again address the House. Sir Hugh Dalrymple had died a short time before, having been Lord President of the Court of Session for the long period of forty years. The vacant chair was offered to Forbes, who took his seat on the bench on the 21st of June 1737. The bar congratulated him on his appointment, and thanked him for his conduct as Lord Advocate. "Joy," it is said, "was visible on every face."

As Lord President, Forbes did not disappoint the expectations of the country. There were heavy arrears in the Court, which he wiped off with characteristic energy. Soon after he was appointed, the Clerks of Court were directed to make up a roll of all the causes which were in Court and remained undecided at the close of the summer session. This roll was to be fixed on the walls of the Court-House; during the next winter session the causes were to be heard in order; and "the Lords do further declare that, from and after the said first day of November next, they will proceed to discuss the rolls both in the Inner and Outer House, and will not grant any delays on pretence of the lawyers not attending, or not being prepared to debate."¹ The effect of this regulation was that some causes which had been in Court for periods of from ten to thirty years were at once decided; and in less than three years from the time Forbes went upon the bench, the whole of the arrears were disposed of. At the close of the winter session of 1740 he writes: "When the term ended this day, no cause ripe for judgment remained undetermined: none that, within the rules of the Court, could possibly have been decided was laid over to the next term; a circumstance that has not

¹ Act of Sederunt, 29th July 1737.

happened within any man's memory, and of which the mob are very fond."¹

Over his fellow-judges Lord President Forbes exercised a wise control. He did much to soften the harshness and want of taste which were among the failings of the bench at that time. To the bar his manner was extremely courteous; and he seldom interrupted the counsel who were pleading before him. This helped to maintain the dignity of the Court; for judges who begin by interrupting counsel often end by interrupting each other. But he was strict in his dealings with any member of the bar whom he suspected to be guilty of conduct unworthy of the profession. On one occasion he called the Dean of Faculty before him, and complained that papers which misrepresented facts were sometimes laid before the Court. These, it was said, had not been prepared by counsel. "Whatever," replied the Lord President, "is signed by a lawyer, or has his name subjoined thereto, is a deed of that lawyer, and he rests his character upon what is therein advanced." The Dean undertook to warn the Faculty.²

Of the private life of Forbes few memorials remain. He married, early in life, Mary Rose, the daughter of a Highland laird, Hugh Rose of Kilravock, whose house was near Culloden. She is said to have been both good and beautiful; and a stone on the Moor is still pointed out as the place where she and Duncan Forbes used to meet as lovers. Soon after their marriage she died, leaving one son, who, after serving in the army, succeeded his father in the estate of Culloden.³ Forbes himself had become possessor of the

¹ Forbes to Grant (Solicitor-General), 29th Feb. 1740, Culloden Papers, No. 198.

² Act of Sederunt, 15th June 1738.

³ Hill Burton, *Lives of Lovat and Forbes*, 281-283, 343. An interesting account of the Roses of Kilravock will be found in Mr. Skelton's *Essays in History and Biography* (Edinburgh, 1883), p. 100.

family property in 1735, on the death of his elder brother, Bumper John.

It was at Culloden that Forbes spent the greater part of each summer recess. He had, however, another country house, Stoneyhill, near Edinburgh, once the property of Colonel Francis Charteris, whose name was long a byword in Scotland for all that was vicious and profane. Charteris, in the course of his career, was tried for a criminal assault on a woman whose character was as bad as his own. He was found guilty and condemned to death. As King's Advocate, Forbes had given his concurrence to the prosecution; but when the trial was over he doubted the justice of the verdict, and procured a royal pardon for the accused. When Charteris, at the close of his misspent life, lay on his deathbed, he bequeathed to Forbes the liferent of Stoneyhill and a legacy of a thousand pounds.

It was the custom of Forbes, after he became Lord President, to go out to Stoneyhill on Saturday when the Court rose. On Sunday he drove to church at Edinburgh, returning to Stoneyhill after dinner; and on Monday, which was a Court holiday, he usually went to play golf on the Links of Musselburgh, which are within a short walking distance of Stoneyhill.

This weekly game at golf was the President's favourite relaxation. He played well, and never lost his temper unless any one was careless. The following description of his game has been preserved: "He struck the ball full, and having a long nervous arm upon a well-poised body, he generally drove very far; when nigh the hole, he tipped with so much caution and circumspection that even a lesson might be learned from him in his innocent amusements; for while they behold the Senator judiciously employed in such wholesome exercises as tended to an improvement in a laudable dexterity, they were by his example discouraged

from the idle and insinuating recreations that entirely depend upon chance, and that generally are played in the most undue proportion.”¹

He had played golf regularly even when he was Lord Advocate. “This day,” he writes on the 1st of November 1728, “after a very hard pull, I got the better of my son at the goulf in Musselburgh links. If he was as good at any other thing as he is at that, there might be some hopes of him.”²

His favourite studies during his leisure hours were Hebrew and Philosophy.³ It was said that he had read the Hebrew Bible through eight times. The severe type of religion which had been common, even at the bar, during the seventeenth century, was dying out when Forbes joined the profession. His mother, some of whose letters are preserved, had done all she could to impress on her son during his youth the sentiments and principles of a generation which was passing away. Her piety was somewhat stern. “I was much surprised,” she writes, “as well as grieved, to find that you journeyed from Innes upon the Sabbath.”⁴ Forbes had never professed to be a saint, but in his later years he thought and wrote much on religious subjects. He entered the lists as the champion of orthodoxy against Matthew Tindal, who had been an author before Forbes was called to the bar; and he published “A Letter to a Bishop,” in which he expounded the theory of John Hutchinson, that all the truths of all the sciences are to be found in the books of the Old Testament.

But his studies of Hebrew and Philosophy were merely pastimes. In addition to his judicial work, Forbes carried

¹ Memoirs of Forbes, Pamphlets, Advocates' Library, 702.

² Hill Burton, Lives of Lovat and Forbes, 330.

³ Hailes' Catalogue (ed. 1798), Add. Notes, p. 31.

⁴ Hill Burton, Lives of Lovat and Forbes, 274.

on a large correspondence with public men, and watched, with the keen eye of a practical politician, the progress of events in Scotland, and most of all in the Highlands. It was he who first suggested the formation of those Highland regiments, whose valour has added so much glory to the arms of Britain. When Erskine of Grange resigned his office of Justice-Clerk, and went into Parliament, Andrew Fletcher of Milton, an able man, and the friend both of Islay and of Forbes, succeeded him. One morning before breakfast Forbes arrived at Fletcher's house of Brunstane, which is some miles from Edinburgh. The Justice-Clerk, surprised at seeing him so early, asked what was the matter. "A matter," replied Forbes, "which I hope you will think of some importance. You know very well that I am, like you, a Whig; but I am also the neighbour and friend of the Highlanders, and intimately acquainted with most of their chiefs. For some time, I have been revolving in my mind different schemes for reconciling the Highlanders to Government; now I think the time is come to bring forward a scheme, which, in my opinion, will certainly have that effect." He then explained his plan. Thirty years afterwards Lord Chatham boasted, with just pride, that he was the first Minister who sought for merit in the mountains of the north. The plan which Lord President Forbes now proposed was that, in view of the danger of war with Spain, the Government should go to the north, and raise four or five regiments of Highlanders. "If Government," he said, "pre-engages the Highlanders in the manner I propose, they will not only serve well against the enemy abroad, but will be hostages for the good behaviour of their relations at home; and I am persuaded it will be absolutely impossible to raise a rebellion in the Highlands." On the following day Islay was at Brunstane, and Fletcher, as one of the Officers of State for Scotland, explained the Lord President's plan.

Islay laid the matter before Walpole. A Cabinet Council discussed the proposal, which was rejected on the ground that if Government adopted "the plan of the Scots Judge," the Opposition would raise the cry that the Highlanders were to be used for the purpose of overawing the people of England.¹ In less than five years the Highlanders were gathering round the standard of the Pretender.

The Rebellion came as a complete surprise to the Government in Scotland. It was on the 23d of July 1745 that Charles Edward landed on Eriska. Ten days later Forbes wrote to Pelham, and mentioned that in Edinburgh everything was in a state of profound tranquillity, that there were rumours afloat of an intended invasion by the Pretender's eldest son, but that "this young gentleman's game seems at present to be very desperate in this country." On the 8th of August, however, he wrote to the Marquis of Tweeddale, then Secretary of State for Scotland, saying, "I have resolved to make my journey to the north country earlier this season than usual; as my presence there may be of more service to the public than it can be of here, should the report, which I look upon as highly improbable, have any foundation in truth."² On the following day he left Edinburgh, and reached Culloden on the 13th. He no longer doubted that the young Pretender was in Scotland. "I take it to be certain," he writes, "that 12 or 14 days ago that young Gentleman landed on the coast of Arisaig." He at once set to work to promote the interests of Government, to encourage the loyal, to warn those of whom he was doubtful, and to send despatches to the military authorities in the south, advising them what to do in order to check the Rebellion. While many, who pretended to be King George's friends, were spreading

¹ Home, *History of the Rebellion in 1745*, 20-23; Hill Burton, *Hist. Scot.* (1689-1748), ii. 384; *Lives of Lovat and Forbes*, 368, 369.

² *Culloden Papers*, No. 247.

alarming rumours, he was doing all he could to cheer the faint-hearted.

News travelled slowly in those days ; and the rumours of Jacobite victories were disbelieved among the loyal in the north. On the 24th of September, three days after the battle of Prestonpans, all Forbes knew was that the rebels had entered Edinburgh on the 17th.¹ The Jacobites remained quiet till the news came that Cope had been totally defeated. There was then no concealment. "All Jacobites, how prudent soever, became mad ; all doubtful people became Jacobites ; and all Bankrupts became heroes, and talked nothing but hereditary rights and victories ; and, what was more grievous to men of gallantry, and, if you will believe me, much more mischievous to the publick, all the fine Ladys, if you will except one or two, became passionately fond of the young Adventurer, and used all their Arts and Industry for him in the most intemperate manner. Under these circumstances, I found myself almost alone, without troops, without arms, without money or credite ; provided with no means to prevent extream folly, except pen and ink, a tongue and some reputation ; and if you will except MacLeod, whom I sent for from the Isle of Sky, supported by nobody of common sense or courage."² These heavy responsibilities were lightened by the arrival of Loudoun and his troops ; but as, from time to time, they heard of the triumphant march of the rebels, the President's health became so bad that his friends were seriously alarmed.³

Early in September the Government decided to raise twenty independent companies in the Highlands. This was done on the advice of Lord Stair.⁴ The task of choosing the

¹ Forbes to Sir John Gordon, 24th Sept. 1745, MSS. Advocates' Library, 35. 6. 4.

² Forbes to Mitchell, 13th Nov. 1745, Culloden Papers, No. 294.

³ MSS. Advocates' Library, 35. 6. 4, ii. 289.

⁴ Tweeddale to Lord Advocate Craigie, 4th September 1745, Glendoick MSS.

officers was intrusted to Forbes, to whom twenty blank commissions for captains, lieutenants, and ensigns were transmitted.¹ "The burden of disposing the commissions is a great one, and which I very unwillingly undertake," he writes, on receiving the packet, "but since necessity urges, I shall do according to the best of my judgment."

With Simon Fraser, Lord Lovat, Forbes had long been intimate. They had acted together during the rebellion of 1715; Forbes had been Lovat's counsel in more than one law-suit; and they had corresponded for years. As soon as Forbes came to Culloden in August, Lovat dined with him, and talked of his zeal for the reigning family. But there is good reason to think that the President suspected him. It is said that when one of Lovat's sons, a young lad, was at Culloden, Forbes showed him a handful of French coins, and asked him if he had ever seen money like that in his father's house? He was soon convinced of the treachery of Lovat, who had sent his son and a number of men to join the Pretender. "As I have now the honour," Forbes wrote to the cunning old peer, "of being charged with the public affairs in this part of the kingdom, I can no longer remain a spectator of your lordship's conduct, and see the double game you have played for some time past, without betraying the trust reposed in me, and at once risking my reputation, and the fidelity I owe to his Majesty as a good subject." He warned him of the danger of what he was doing, and advised him to recall his son at once.² It would have been well for Lovat if he had taken the President's advice; but he persisted in trying to show that he was loyal and not to blame for what his son had done. "Am I, my Lord," he wrote to Forbes, "the first father that has had ane un-

¹ Mitchell (Under-Secretary of State of Scotland) to Forbes, 5th September 1745, Culloden Papers, No. 267.

² Forbes to Lovat, 29th October 1745, Culloden Papers, No. 485.

dutiful and unnatural son?"¹ But the Lord President was not to be deceived, and continued to press Lovat to retrace the false step which he had taken.

At last the news that the rebel army had retreated from Derby, and was returning to Scotland, reached Forbes in the north. He at once foresaw that the retreat would probably end at Inverness, and wrote to the Marquis of Tweeddale, begging him to send a supply of arms. "If they come in due time," he said, "we shall be able to put Arms into the hands of 2 or 3000 Highlanders, to resist an impression which otherwise may be not only fatal to Gentlemen who have, at this juncture, deserved signally well of his Majestie, but may tend to lengthen out our confusions till the spring, and, by weakening the hands of Brittain, give infinite advantage to France and Spain, to the very great danger of the libertys of Europe." The arms did not arrive in time; and the approach of the rebels compelled Forbes to retire, along with Londoun, to the west. They crossed to the island of Skye, where they remained until after the battle of Culloden.

At Inverness, after the defeat of the Pretender, Forbes met the Duke of Cumberland. When they were discussing the means which should be taken for finally crushing the Rebellion, the President spoke of the laws of the country. "The laws of the country, my Lord?" exclaimed the Duke, "I'll make a brigade give laws, by God!" A number of rebel prisoners had been shot in cold blood in the court of Culloden House; and Forbes, disgusted at the atrocities committed by the royal troops, ventured to speak to the Duke on the subject. Cumberland was angry at his plain language, and wrote to the King, complaining of the President, whom he afterwards spoke of as "that old woman who talked to me about humanity."²

¹ Lovat to Forbes, 30th October 1745, Culloden Papers, No. 287.

² Hill Burton, *Lives of Lovat and Forbes*, 382.

During the Rebellion it had been well known that Forbes was doing good service to the Government. "Your behaviour on this occasion," wrote Mitchell in September 1745, "and the part you are now acting, meets with the universal applause of every Whig subject his Majesty has, a very few excepted." Yet, when the peril was at an end, he was neither rewarded nor thanked. He had not only worked hard, but he had spent freely. When the Highland companies were being raised, the Marquis of Tweeddale had informed him that he was to draw on the Treasury for the funds he needed. The interruption of correspondence with the south made it impossible to obtain remittances from London. The President, however, spent all his own ready-money, and borrowed as much as he could. "The Rebellion is now happily over," he writes in May 1746, "and the persons who lent me this money, at a pinch, are now justly demanding payment; and I, who cannot coin, and who never hitherto was dunned, find myself uneasy." He did not ask for immediate payment of his own money; all he wanted was funds to repay a number of small loans, which amounted to about £1500.¹ This sum, small though it was, he did not obtain. In June he went to London, and was received with marked coldness. At an interview which he had with the King, his Majesty asked him "if it was true that a party of the Duke's army had killed certain supposed rebels, who had fled for safety into the court of Culloden House?" "I wish I could say No," answered Forbes. This uncourtierlike answer annoyed the King, and the President fell into disfavour.²

He returned to Scotland without his money, and without having been thanked for his services. The wrong which had been done to him injured his health. He continued to attend to business, and took an interest in the legislation

¹ Forbes to Scrope, 13th May 1746.

² Forbes' Works (1816), xiv.

which followed the Rebellion; but his strength was shattered. The physicians said he was suffering from consumption; but his friends thought that his ailment was a broken heart. In November 1747 he wrote to his son: "Dear John, I am very sorry for you. The great charges and expenses I have been at in supporting his Majesty in the Rebellion have far exceeded the sum I thought it would have cost when I saw you last. I would advise you to go to London, where I believe I may have some friends yet. Mr. Scroop, Mr. Littleton, and Mitchell, are kind-hearted, affectionate men, and they will tell the King that his faithful servant Duncan Forbes has left you a very poor man. Farewell; may the God of heaven and earth bless you."¹

On the 10th of December 1747 he died. His son, who had been sent for from England, saw him on his deathbed. "My dear John," he said, "you have come just in time to see your poor father die. . . . You have come to a very poor fortune, partly by my own extravagance and the oppression of power. I am sure you will forgive me, because what I did was with a good intention." Then he gave, in hurried accents, some parting words of advice, and told him whom he thought he could trust. "Mitchell will advise you." "I depend upon Scrope." "John Hossack will help you in your affairs in the north." He was sinking fast. "I trust," he said, "in the blood of Christ. Be always religious: fear and love God. You may go: you can be of no service to me here." These were his last words:

"Vitaque cum gemitu fugit indignata sub umbras."

The news of the President's death was received with deep sorrow throughout Scotland. Five years after, a marble statue, the work of Roubiliac, was erected to his memory. It still remains in the hall of the Court which he adorned.

¹ Hill Burton, *Lives of Lovat and Forbes*, 386.

The President is sitting in the chair of justice, clothed in the robes of office, and bending forward, with solemn face and outstretched hand, as if to restrain the passions of those who plead before him. Beneath, a short inscription tells that the statue was dedicated, by the bar of Scotland, “*Judici integerrimo, civi optimo, priscae virtutis viro.*”

THE END OF VOL. I.

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